IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1439

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Dated: April 10, 1976.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Jerry Lee Smith respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit affirming petitioner's conviction by a jury for violations of 18 U. S. C. § 1461 for seven distributions of allegedly "obscene" materials wholly within the State of Iowa, despite the Iowa Legislature's express decriminalization of the distribution of arguable "obscene" materials to adults in Iowa. The petition thus presents a significant question of federal-state relations in the "obscenity" area.

OPINIONS BELOW.

The Court of Appeals directed that its opinion not be printed or published. The opinion is reproduced in the Appendix herein (Appendix, p. A-1). The Federal District Court for the

Southern District of Iowa issued an unreported order denying a motion for a new trial, which appears at Appendix, p. A-4.

JURISDICTION.

The jurisdiction of the Iowa District Court was based on 18 U. S. C. § 3231. The jurisdiction of the Court of Appeals was founded upon 28 U. S. C. § 1291.

The judgment of the Court of Appeals was entered on February 13, 1976. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1). On March 9, 1976, Mr. Justice Blackmun extended the time for filing this petition to April 12, 1976.

QUESTIONS PRESENTED.

1. Does the conscious determination of the Iowa legislature, that contemporary community standards in that state do not require criminal prohibition of the distribution of arguably "obscene" materials to consenting adults, establish the local community standard which must be applied by a federal court and jury in the context of a prosecution, under 18 U. S. C. § 1461, for a wholly intrastate distribution of allegedly "obscene" materials through the United States mails?

2. Is 18 U. S. C. § 1461 unconstitutionally vague as applied in this case?

3. Is it a denial of due process of law to refuse to permit a defendant at *voir dire* to inquire of prospective jurors as to their knowledge of local "contemporary community standards" concerning what material, taken as a whole, appeals to the prurient interest?

CONSTITUTIONAL PROVISIONS INVOLVED.

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED.

Chapter 725 of the Code of Iowa prohibits the distribution of "obscenity" only to minors. The statute is exclusive and expressly preempts any prosecution for the distribution of materials to adults. The statute provides in pertinent part:

> "725.9. Uniform Application. In order to provide for the uniform application of the provisions of Sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no municipality, county, or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances and regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974."

Chapter 725 of the Code of Iowa is printed in its entirety at Appendix, p. A-7.

The federal statute here at issue, 18 U. S. C. § 1461, provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . .
>
> * * * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable,

> or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation of disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

* * * * *

STATEMENT OF THE CASE.

This case concerns the decision of the District Court, affirmed per curiam by the Court of Appeals, to permit federal jurors in Iowa to substitute their own, wholly subjective and unascertainable standard of "obscenity" for the express "contemporary community standard" established by the Iowa Legislature.

In 1974, the Iowa Legislature voted to decriminalize the distribution of arguably "obscene" materials to adults within Iowa by enacting Chapter 725 of the Code of Iowa.* On March 26, 1975, the United States Grand Jury for the Southern District of Iowa returned an Indictment charging the petitioner Jerry Lee Smith with seven violations of the federal statute prohibiting distribution of "obscene" materials through the United States mails, 18 U. S. C. § 1461. The petitioner pleaded not guilty, and was tried by a jury and convicted on each count of the Indictment on September 9, 1975. On October 14, 1975, petitioner was sentenced to three years imprisonment, of which all but six months were suspended. The defendant was placed on probation for three years.

The mailings involved occurred totally within the State of Iowa. All were made at the written request of the purported re-

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* The Iowa House of Representatives passed Chapter 725 by a vote of 87-1. Journal of the House, 65th General Assembly, 1974 Regular Session, 2291. The Iowa Senate passed Chapter 725 by a vote of 46-0. Journal of the Senate, 65th General Assembly, 1974 Regular Session, 1638.

cipients. The mailings were addressed to federal postal drop boxes with fictitious persons listed as owners. The mail delivered to those boxes is opened by postal inspectors. No evidence was ever adduced that the materials entered any other state.

Prior to the selection of the jury, petitioner submitted proposed *voir dire* questions designed to elicit the understanding of prospective jurors concerning the "contemporary community standards" under which the alleged "obscenity" of the materials should be measured.* The District Court refused to ask those questions and denied petitioner the right to make his own inquiries of the prospective jurors.

The government offered no evidence at trial concerning what local "contemporary community standards" governed the "obscenity" of the materials involved, simply introducing the materials themselves. Petitioner's motion for acquittal at the conclusion of the government's case was denied.

In defense, petitioner placed in evidence a copy of Chapter 725 of the Iowa Code and established that materials comparable to those for which he was being prosecuted were available for over the counter purchase throughout Iowa. At the close of the evidence, petitioner's renewed motion for acquittal, based on the claim that the appropriate community standard for measuring the "obscenity" of the materials was established by

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* These questions were as follows:

"Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

"The following individual questions are requested for each juror who answers the above question in the affirmative.

"Where did you acquire such information?

"State what your understanding of those contemporary community standards are.

"In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity?

"State what your understanding of those laws are?"

the Iowa Legislature in Chapter 725 of the Code of Iowa, was denied.

The District Court then proceeded to instruct the jurors that "you are each entitled to draw on your own knowledge of the views of the average person in the community from which you come as well as consider the evidence presented as to the state law on obscenity and materials available for purchase in certain stores as shown by the evidence." After the guilty verdict was returned, petitioner moved for a new trial, but the motion was denied. Petitioner appealed the District Court's rulings to the Court of Appeals, which affirmed per curiam.

REASONS FOR GRANTING THE WRIT.

I.

THE COURTS BELOW IMPROPERLY DISREGARDED THE "CONTEMPORARY COMMUNITY STANDARD" ESTABLISHED BY THE IOWA LEGISLATURE.

The issue of federal-state relations presented in this case—the conflict between a state's decision to decriminalize "obscenity" and a federal prosecution under 18 U. S. C. § 1461 for an intrastate distribution—has not previously been before this Court.* The question raised is ripe for a decision by this Court.

A number of states have chosen to deregulate "obscenity" since the issuance of this Court's *Miller* decisions.** In addition to Chapter 725 of the Code of Iowa, *see* the similar statutes of New Mexico, *N. M. Stat. Ann.* Ch. 40 §§ 50.1-50.8 (Supp. 1975); South Dakota, *S. D. C. L.* § 22-24-28 (Supp. 1975); Vermont, 13 *V. S. A.* §§ 2801-2807 (Supp. 1975); and West Virginia, *W. Va. Code Ann.* Ch. 61 § 8A(1)-(7) (Cum. Supp. 1975). Hawaii has repealed its "obscenity" law. *Hawaii Rev. Stat.* Ch., 37, § 712-1212 repealed SL 1973, C136 § 10. Further, Alaska regulates only the distribution, exhibition, and sales of "objectionable" comic books. *Alaska Stat. Ann.* § 11.40.160-11.40.180 (1973).

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* The Court recently denied certiorari in *Danley* v. *United States,* 523 F. 2d 369 (9th Cir. 1975), *cert. denied,* 44 U. S. L. W. 3469 (February 23, 1976), which involved a similar conflict between Oregon's deregulation of "obscenity" and an 18 U. S. C. § 1461 prosecution, but the record there reflected interstate shipments of the allegedly "obscene" materials. To the extent *Danley* is not distinguishable on this ground, it is wrongly decided for the reasons stated herein and further buttresses the necessity for a ruling by this Court.

** *Miller* v. *California,* 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973).

These states have taken an approach directly sanctioned by this Court. Thus, in *Paris Adult Theater I* v. *Slaton,* 413 U. S. 49, 64 (1973), the Court stated:

> "[T]he States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer . . ."

In *United States* v. *Reidel,* 402 U. S. 351 (1971), the Court even suggested that such an approach may be the most "desirable."

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. *This may prove to be the desirable and eventual legislative course.* But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances." *Id.* at 357. (Emphasis added.)

But, the rulings below permit federal juries to abrogate the conscious determination of a state legislature to "drop all controls on commercialized obscenity." Under those rulings, federal jurors in the context of a prosecution under federal law can substitute their own judgments as to the "obscenity" of a work for the express finding of the state legislature that nothing is "obscene" for adults in that state. Such a result is fundamentally at odds with this Court's recent "obscenity" decisions and the federalist principles enunciated therein.

In the first place, this Court has firmly rejected the notion, apparently adopted by the District Court and the Appellate Court below, that "juries have unbridled discretion in determin-

ing what is "obscene." *Jenkins* v. *Georgia*, 418 U. S. 153, 160 (1974). As stated in *Hamling* v. *United States*, 418 U. S. 87, 118 (1974), "The definition of obscenity . . . is not a question of fact [for the jury], but one of law [for the court]; the word 'obscene' as used in 18 U. S. C. § 1461, is not merely a generic term, but a legal term of art." Consequently, this Court has directed that jurors considering the "obscenity" of a work be "guided always by limiting instructions on the law." *Miller* v. *California*, 413 U. S. 15, 30 (1973).

Secondly, the Court has determined that the content of those legal guidelines should properly be set by the state legislatures. The Court has recognized that the reguiation of "obscenity" is predominately a matter of state, not federal, interest. The interests in regulating "obscenity" were defined by the Court in *Paris Adult Theatre I* v. *Slaton, supra*, 413 U. S. at 57-58:

> "[W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests 'other than those of the advocates are involved.' *Breard* v. *Alexandria*, 341 U. S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."

These interests are the "traditional" province of the individual states in the exercise of their police power to protect the public welfare. As stated in *Miller, supra*, 413 U. S. at 29:

> "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power [to regulate "obscenity"] reserved to them under the constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day."

No independent federal interests were identified.

Indeed, the Court expressly found that local interests in this area transcend any need for national uniformity.

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 32-33.

Consequently, in an attempt to ameliorate the "tension" between these state interests and the federal system, the Court expressly rejected a national standard and mandated that the "obscenity" of a work be judged by the trier of fact with reference to the "contemporary community standards" of the "average person" in the local community involved, "guided always by limiting instructions on the law."

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

In recognition of the state interests involved, the Court declared that the state legislatures were empowered to establish the applicable community standard. Therefore, the Court in *Miller* concluded:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts." *Id.* at 25.

In undertaking this effort, the Court also affirmed the right of the state legislature to preempt any more localized community standard than that established by the legislature.

> "*Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*." *Jenkins* v. *Georgia, supra,* 418 U. S. at 157.

In *Miller*, the Court held that California could constitutionally proscribe "obscenity" in terms of a "statewide" standard.

As detailed *supra*, at p. 9, the Court recognized the right of a state legislature to decriminalize "obscenity." Indeed, *Miller* rejected the "national" standards test on the ground, *inter alia*, that a "local" standard would allow a given community to apply a more permissive test:

> "The use of 'national' standards . . . necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." 413 U. S. at 32 n. 13.

Moreover, the Court has recognized that a state's determination of the local "contemporary community standards" is binding upon jurors. As made clear in *Hamling, supra*, the local community standard approach was adopted precisely to prevent "obscenity" judgments from being based on the personal prejudices of individual jurors.

> "This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment [of 'obscenity'] be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. *Miller* v. *California, supra,* at 33; *Mishkin* v. *New York*, 383 U.S. 502, 508-509 (1966); *Roth* v. *United States*, 354 U.S. [476], at 489 [1957]." 418 U. S. at 107.

Here, the Iowa Legislature has expressly determined that "contemporary community standards" in Iowa do not require a prohibition of the distribution of arguably "obscene" materials to adults and declared that its determination preempts any other prohibition governing a geographic area of lesser scope. But the courts below ruled that Iowa's legislative determination is not binding on a jury applying federal law, and that the jury can adopt its own, different standard.

The courts below relied on this Court's decision in *Hamling, supra*. In *Hamling*, the Court affirmed a conviction under 18 U. S. C. § 1461 by a jury in the Federal District Court for the Southern District of California for interstate mailings of allegedly "obscene" materials, mailed from California. In *Hamling*, the Court expressly extended the local "contemporary community standard" test to prosecutions under 18 U. S. C. § 1461:

> "In *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973), a federal obscenity case decided with *Miller*, we said:
>
> > 'We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller* v. *California, ante*, at 23-25. These standards are applicable to federal legislation.' *Id.*, at 129-130.'
>
> Included in the pages referred to in *Miller* is the standard of the 'the average person, applying contemporary community standards.' In view of our holding in *12 200-ft Reels of Film*, we hold that 18 U.S.C. § 1461 incorporates this test in defining obscenity." 418 U. S. at 105.

The District Court and the Court of Appeals noted that ruling and cited the following statement of the Court as supporting the proposition that the content of the local community standard in an 18 U. S. C. § 1461 prosecution is the exclusive province of the federal jury.

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowl-

> edge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Ibid.*

But, in *Hamling*, the Court was not faced with the situation presented here, where the forum state legislature has expressly declared the applicable "contemporary community standard" for the local community involved, the geographic area encompassing the Southern District of Iowa. Consequently, the above quoted statement from *Hamling*, relied upon below, has no application to the present case.

Under the approach adopted by the District Court and the Court of Appeals, two juries—one state and one federal—drawn from the same local community, are guided by totally different conceptions of the community standard in "obscenity" prosecutions. But, in *Miller*, the Court ordered the application of one local "contemporary community standard," governing both federal and state "obscenity" prosecutions. Thus, in *Miller*, the Court summarized its holding:

> "In sum, we . . . hold that obscenity is to be determined by applying 'contemporary community standards,' see *Kois* v. *Wisconsin*, [408 U. S. 229 (1972)] *supra*, at 230, and *Roth* v. *United States*, [354 U.S. 476 (1957)] *supra*, at 489, not 'national standards.' " 413 U. S. at 36-37.

The Court's citation of both *Kois*, a state case, and *Roth*, a federal case, indicates that the same "contemporary community standards" should be applied in federal, as well as state, prosecutions.

Hence, to the extent a state in which a distribution occurs has adopted a local community standard of non-"obscenity" for adults, that legal guideline should be binding on a federal, as well as a state, jury. Any other result would be inconsistent with this Court's deliberate de-nationalization of "obscenity" and its express recognition of the state's right to establish the governing community standards. Moreover, if the judgment of the state

legislature is ignored, the effect is to have the federal statute preempt state law.

Yet, in *Schwartz* v. *Texas*, 344 U. S. 199, 202-203 (1952), this Court stated that, "The exercise of federal supremacy is not lightly to be presumed." In *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470 (1974); *Merrill, Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U. S. 117 (1973); *New York Dept. of Social Services* v. *Dublino*, 413 U. S. 405 (1973); and *Goldstein* v. *California*, 412 U. S. 546 (1973), the Court has recently affirmed the need to protect federalism by a strict interpretation of federal preemption. *See also* Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court", 75 *Colum. L. Rev.* 623 (1975).

Thus, in *Goldstein*, the Court refused to hold that California's prohibition on record piracy was preempted by federal copyright law. The Court emphasized the traditional role of the states in promoting "those portions of science and the arts which were of local importance," 412 U. S. at 557, and concluded that the limited national interests involved did not conflict with the divergent interests of citizens in different parts of the country. The Court stated:

> "No conflict will necessarily arise from a lack of uniform state regulation, nor will the interest of one state be significantly prejudiced by the actions of another." *Id.* at 560.

Similarly, in the "obscenity" area the Court has recognized the predominate state interests and the lack of any need for national uniformity. *Miller, supra*, 413 U. S. at 32-33, quoted *supra* at p. 11.

Ware concerned a claim of a forfeiture by the respondent of benefits in a non-contributory profit-sharing plan under the terms of an employment agreement. Petitioner Merrill, Lynch argued that a New York Stock Exchange Rule, enacted pursuant to Section 6 of the Securities Exchange Act of 1934, 15 U. S. C. § 78(f), directing arbitration of any controversy arising from employment terminations, preempted two California state

statutes. The first statute voided the employment agreement for including a non-competition clause; the second required that arbitration clauses be disregarded in individual actions for the collection of wages. The Court refused to preempt, stressing California's "strong policy of protecting its wage earners." 414 U. S. at 139.

In reaching its decision, the Court noted the legitimate expectation that an individual will receive uniform treatment in the state of his residence.

> "In effect, we are asked to sacrifice the individual's expectation of uniform treatment in the State of his residence for uniformity of application of the effect of an exchange's rules." *Id.* at 138.

Here, petitioner Jerry Lee Smith could legitimately expect that his conduct in distributing arguably "obscene" materials to soliciting adults in Iowa was sanctioned by Chapter 725 of the Code of Iowa. In such circumstances, *Ware* dictates that preemption is unfair and unwarranted, absent compelling national interests in uniformity, which have been expressly rejected by this Court in the "obscenity" area.

In *Ware*, the Court, relying heavily on the analytical framework in *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), also emphasized the need to harmonize conflicting statutes.

> "Our analysis is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' [Silver, *supra*] *Id.*, at 357, 10 L. Ed. 2d 389." 414 U. S. at 127.

Here, the conflict between Iowa law and 18 U. S. C. § 1461 is appropriately reconciled by holding that the Iowa statute establishes the "contemporary community standard" for purposes of an 18 U. S. C. § 1461 distribution to Iowa residents. This approach is particularly apt given the wholly intrastate nature of the distribution.

Federal courts have previously turned to state law to flesh out the details of Congressional enactments. For example, in the securities law area, federal courts have looked to the forum state to obtain the statute of limitations for suits brought under § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. 78(j)(b), which is silent on the point. The premise for this procedure is stated in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946):

> "As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation . . . [citing cases] The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349-50, 351-52 [1939]."

Here, Congress has not stated what community standard applies in an 18 U. S. C. § 1461 prosecution.

In a related context, the *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), line of cases reflects this Court's willingness to apply state law, rather than strive for an unjustified national uniformity. In holding that federal courts must apply the conflict of laws rules of the forum state, the Court stated in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496 (1941):

> "Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general' law of conflict of law."

Under the federalist principles of *Erie*, a federal jury in a tort case in Iowa could not disregard Iowa's state law which permits an automobile driver to make a right turn after stopping at a red

light on a traffic signal and hold that conduct to be negligent *per se* on the basis of the individual jurors' own judgment as to the propensities of a "reasonable person" under the circumstances. By the same token, under the principles established in *Miller* and its progeny, a federal jury in Iowa should not be permitted to disregard the state legislature's decision, that community standards in Iowa do not require the criminal prohibition of distributions of arguably "obscene" materials to adults in Iowa, and convict a person for such conduct on the basis of the individual jurors' own belief as to the "contemporary community standards" of the "average person" in the local community.

Consequently, the Court should grant certiorari to resolve the conflict between Iowa's legislative decision to decriminalize the distribution of arguably "obscene" materials to adults in Iowa and the interpretation of 18 U. S. C. § 1461 adopted by the District Court and the Court of Appeals.

II.

18 U. S. C. § 1461 IS UNCONSTITUTIONALLY VAGUE AS APPLIED.

The rulings below, that jurors in an 18 U. S. C. § 1461 case are themselves able to determine what community standard applies and what the dimensions of that standard are, render that statute unconstitutionally void for vagueness. Vague laws are invalid under the Due Process Clause of the Fifth Amendment and the First Amendment if they: do not provide the public with fair notice of what is prohibited; are subject to arbitrary enforcement and application; or infringe on the exercise of protected rights. As stated in *Grayned* v. *City of Rockford*, 408 U. S. 104, 108-109 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " (Footnotes omitted.)

Statutes which affect the area of First Amendment rights, like 18 U. S. C. § 1461, are, therefore, particularly vulnerable to attack for vagueness, because the "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button*, 371 U. S. 415, 432 (1963). The Court has imposed a strict standard recognizing that "the freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963). A strict standard is particularly apt in the "obscenity" area where the line between the "obscene" and the "non-obscene" is admittedly elusive. *Stanley* v. *Georgia*, 394 U. S. 557, 566 (1969). *Cf. Miller* v. *California, supra*, 413 U. S. at 24.

Under these standards, the interpretation of 18 U. S. C. § 1461 by the District Court and the Court of Appeals is necessarily invalid. The subjective whim of individual jurors as to the governing "community standard" concerning what is "obscene" is unascertainable in advance of the verdict. Indeed, appellate review of the jury's verdict is effectively precluded as the "community standard" applied may never be known. Such an approach is obviously subject to arbitrary enforcement and

application* and of necessity must "chill" the exercise of protected First Amendment rights.

III.

THE DISTRICT COURT'S REFUSAL TO PERMIT VOIR DIRE QUESTIONING OF THE JURORS' KNOWLEDGE OF LOCAL "CONTEMPORARY COMMUNITY STANDARDS" DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

The District Court refused to permit questioning of prospective jurors at *voir dire* concerning their knowledge of the "contemporary community standards" as to what materials, taken as a whole, appeal to prurient interests. That ruling was affirmed by the Court of Appeals. In so ruling, the courts below denied petitioner his due process right to determine whether he would be tried by a jury capable of rendering a fair and impartial jury.

This Court has recognized that a basic element of the Sixth Amendment guarantee of an impartial jury is the right to make appropriate inquiries at *voir dire*. Thus, in the landmark decision of *Aldridge* v. *United States*, 283 U. S. 308 (1931), the Court reversed a murder conviction due to the failure of the trial court judge to make a *voir dire* inquiry as to the racial prejudices of prospective jurors. In both *Dennis* v. *United States*, 339 U. S. 162 (1950) and *Morford* v. *United States*, 339 U. S. 258 (1950), the Court held that defendants have the right to inquire into political prejudices.

The purpose of such *voir dire* questioning is to permit the defendant to determine whether a prospective juror is capable of rendering an impartial verdict. As stated by Justice Marshall in his concurrence in *Ham* v. *South Carolina*, 409 U. S. 524, 531-32 (1973):

* Indeed, in *Jenkins* v. *Georgia*, 418 U. S. 153 (1974) the Court was compelled to reverse a jury verdict affirmed by the Georgia Supreme Court, that the celebrated movie, "Carnal Knowledge," was criminally "obscene."

> "We have never suggested that this right to impartiality and fairness protects against only certain classes of prejudice or extends to only certain groups in the population. It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict. It is unsurprising then, that this Court has invalidated decisions reached by juries with a wide variety of different prejudices."

Here petitioner sought to determine whether prospective jurors had any knowledge of "contemporary community standards" or whether their judgment would be based on personal bias concerning what sexually related material should be made available to adults in the community. "Obscenity" is a controversial issue and petitioner's limited proposed inquiry was essential to assure him of his constitutional right to a fair trial.

CONCLUSION.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 10, 1976.

APPENDIX.

UNITED STATES COURT OF APPEALS,
For the Eighth Circuit.

No. 75-1802.

JERRY LEE SMITH, d/b/a INTRIGUE, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 15, 1976
Filed: February 13, 1976

Before CLARK, *Associate Justice,* Retired,* BRIGHT and HENLEY, *Circuit Judges.*

PER CURIAM:

Jerry Lee Smith was convicted in the United States District Court for the Southern District of Iowa on seven counts of placing non-mailable matter in the United States mails in violation of 18 U. S. C. §§ 1461-2 and was sentenced to three years imprisonment on each count to run concurrently, all of which was suspended except for six months. On this appeal

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

Smith asserts two errors by the trial court: (1) In refusing to ask or permit counsel to ask certain questions of the jury panel as to the contemporary community standards existing in the Southern District of Iowa relative to the depiction of sex and nudity in magazines and books; and (2) in not applying Iowa law in the determination of the contemporary community standards applicable to the case.

1. The questions that Smith wished propounded to the jury panel have to do with the juror's knowledge of the contemporary community standards existing in the Southern District of Iowa; where he acquired such information; his understanding of what the contemporary community standards are; if, in arriving at such understanding, he took into consideration the laws of the State of Iowa regulating obscenity; and finally, what is his understanding of those laws.

In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a "right to inquire of the juror what 'contemporary community standards' the juror has knowledge of, if any, and just which of the multiple 'contemporary community standards' the juror will apply to him, and the nature of the 'contemporary community standards' which the juror believes have application to him." But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is "one of law * * * a legal term of art," *Hamling* v. *United States,* 418 U. S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the "reasonable" or

"average" person in other areas of decision making. Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are inborn and often undefinable.

This is not to say that no questions can be asked the jury panel in this area, but only that the specific ones tendered here were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc.

2. This case appears to be controlled by *United States* v. *Danley,* 523 F. 2d 369 (9th Cir. 1975), and *United States* v. *Hill,* 500 F. 2d 733 (5th Cir. 1974); and the Supreme Court of the United States has passed on the second question in *Hamling* v. *United States,* 418 U. S. 87 (1974), where the Chief Justice wrote:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.

This prosecution deals with a federal statute and state law has no bearing on its decision. On the contrary, the federal statute depends on federal law as laid down by the Supreme Court. It has incorporated contemporary community standards in the determination of obscenity. In this connection we note that the trial court admitted into evidence a copy of Iowa's obscenity statute. This was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do. We are bound by the jury decision.

AFFIRMED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT,
Southern District of Iowa,

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JERRY LEE SMITH, d/b/a Intrigue,
Defendant.

Criminal No. 75-46.

ORDER.

On September 9, 1975, a federal jury found defendant Jerry Lee Smith d/b/a Intrigue guilty on seven counts of mailing obscene material in violation of 18 U. S. C. § 1461. The Court now has before it Mr. Smith's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure providing that a new trial may be granted "if required in the interest of justice". The Court however believes that the interest of justice does not so require in this situation, and the motion will be denied.

Defendant's motion is grounded upon the assertion that the Government has failed to sustain its burden of proof to show that the materials involved affronted contemporary community standards. Several reasons are given why this is claimed to be true. First, the Court's refusal to query, or allow counsel to query, prospective jurors as to their knowledge of any such standards, second, the absence of any evidence by the Government purporting to show what the proper standard is; and third, the Government's failure to show any violation of what defendant claims to be the binding standard in this regard—Chapter 725 of the Iowa Code. Defendant also argues that if the standards for the jurisdiction of this court are in fact different from the standard supposedly set forth in Chapter 725 of the Iowa Code,

a guilty verdict offends due process in that jurors were not questioned on the subject before being impaneled.

The Court will first consider the ramifications on this entire matter of the State of Iowa's decision not to regulate obscenity insofar as adults are concerned. Defendant implies that the contemporary community standard has thus been fixed and as such should be deemed controlling for purposes of a federal obscenity prosecution. Such an argument, however, assumes too much. We are dealing with a federal law which neither incorporates nor depends upon the laws of the states. *United States* v. *Hill* (5th Cir., 1974), 500 F. 2d 733. Although the Iowa legislature has chosen as a matter of policy to deregulate the dissemination of obscene materials, except where minors are involved, the federal government has not followed a similar course. Regardless of the state laws, federal proscriptions still remain upon the mailing of obscene materials. In an effort to formulate a workable definition of obscenity for use in federal prosecutions, a "contemporary community standard" has been included as an element thereof, but it does not inexorably follow that such standards are determined by what a state legislature has elected to tolerate. The fact that a state has chosen to permit a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the jury. (See the unpublished opinion of *United States* v. *Danley* (9th Cir., 1975), No. 75-1948.) Therefore, any arguments being advanced which are premised upon the controlling nature of the Iowa law in a federal prosecution must fail.

The Court is also unable to agree that the failure to elicit or have elicited from prospective jurors the extent of their knowledge of a contemporary community standard violated any of defendant's rights. A juror's role in cases of this character is revealed in the following passage from *Hamling* v. *United States*, (1974), 418 U. S. 87, 105:

> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is

> to permit a juror sitting in obscenity cases to draw on knowledge of the community of vicinage from which he comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence in this case as to what constitutes a contemporary community standard and how such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of "reasonableness" be necessary where that standard is an essential element.

Lastly, the Court cannot agree that the Government need introduce evidence of a community standard to sustain its burden of proof. As the Supreme Court has stated, "in the cases in which this Court has decided obscenity questions since *Roth* [*Roth* v. *United States*, 354 U. S. 476], it has regarded the materials as sufficient in themselves for the determination of the question". *Ginzburg* v. *United States* (1966), 383 U. S. 463, 465. The materials introduced by the Government in the trial of this case can and do speak for themselves. See also, *United States* v. *Manarite* (2d Cir., 1971), 448 F. 2d 583 and *United States* v. *Wild* (2d Cir., 1970), 422 F. 2d 34.

In view of the foregoing analysis, It is Hereby Ordered that the motion of defendant Jerry Lee Smith d/b/a Intrigue for new trial be denied.

Signed this 14 day of October, 1975.

/s/ W. C. STUART,
W. C. Stuart,
U. S. District Judge Southern District of Iowa.

CHAPTER 725.

OBSCENITY AND INDECENCY.

725.1 DEFINITIONS. As used in this section and sections 725.2 to 725.10, unless the context otherwise requires:

1. *"Obscene material"* is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

2. *"Material"* means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

3. *"Disseminate"* means to transfer possession, with or without consideration.

4. *"Knowingly"* means being aware of the character of the matter.

5. *"Sado-masochistic abuse"* means the infliction of physical or mental pain upon a person or the condition of a person being fettered, bound or otherwise physically restrained.

6. *"Minor"* means any person under the age of eighteen.

7. *"Sex act"* means any sexual contact, actual or simulated, between two or more persons, either natural or deviate, or between a person and an animal, by penetration of the penis into the vagina or anus, or by contact between the mouth and genitalia or anus, or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

725.2. DISSEMINATION AND EXHIBITION OF OBSCENE MATERIAL TO MINORS. Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.3 ADMITTING MINORS TO PREMISES WHERE OBSCENE MATERIAL IS EXHIBITED. Any person who knowingly sells, gives, delivers or provides a minor with a pass or admits a minor to premises where obscene material is exhibited is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.4 CIVIL SUIT TO DETERMINE OBSCENITY. Whenever the county attorney of any country has reasonable cause to believe that any person is engaged or plans to engage in the dissemination or exhibition of obscene material within his county to minors he may institute a civil proceeding in the district court of the county to enjoin the dissemination or exhibition of obscene material to minors. Such application for injunction is optional and not mandatory and shall not be construed as a prerequisite to criminal prosecution for a violation of sections 725.1 to 725.10.

725.5 EXEMPTIONS FOR PUBLIC LIBRARIES AND EDUCATIONAL INSTITUTIONS. Nothing in sections 725.1 to 725.10 prohibits the use of appropriate material for educational purposes in any accredited school, or any public library, or in any educational program in which the minor is participating. Nothing in said sections prohibits the attendance of minors at an exhibition or display of art works or the use of any materials in any public library.

725.6 SUSPENSION OF LICENSES OR PERMITS. Any person who knowingly permits a violation of section 725.2 or 725.3 to occur on premises under his control shall have all permits and licenses issued to him under state or local law as a prerequisite for doing business on such premises revoked for a period of six months. The county attorney shall notify all agencies responsible for issuing licenses and permits of any conviction under section 725.2 or 725.3.

725.7 EVIDENCE CONSIDERED. At a trial for violation of sections 725.2 and 725.3 the court may consider the material, and receive into evidence in addition to other competent evidence, the offered testimony of experts pertaining to:

1. The artistic, literary, political or scientific value, if any, of the challenged material.

2. The degree of public acceptance within the community of the material or material of similar character.

3. The intent of the author, artist, producer, publisher or manufacturer in creating the material.

4. The advertising promotion and other circumstances relating to the sale of the material.

725.8 AFFIRMATIVE DEFENSE. In any prosecution for disseminating or exhibiting obscene material to minors, it is an affirmative defense that the defendant had reasonable cause to believe that the minor involved was eighteen years old or more and the minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was eighteen years old or more or was accompanied by a parent or spouse eighteen years of age or more.

725.9 UNIFORM APPLICATION. In order to provide for the uniform application of the provisions of sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no

municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1439

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMICI CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION AND THE IOWA LIBRARY ASSOCIATION IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Dated: April 10, 1976.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

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JERRY LEE SMITH,

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INTEREST OF THE AMERICAN LIBRARY ASSOCIATION AND THE IOWA LIBRARY ASSOCIATION.

The American Library Association, founded in 1876, is a non-profit educational organization with its principal place of business located in Chicago, Illinois. Its membership includes more than 34,000 libraries, library trustees and members of the general public who are devoted to the development of library services in the United States. The Association is the chief spokesman for the modern day library movement in North America and, to a considerable extent, throughout the world. Through

its membership and its affiliation with its constituent state library associations, the American Library Association represents 29,000 public, university and special libraries, over 90,000 elementary and secondary and media centers, and over 120,000 librarians. The Iowa Library Association has 1,695 members representing the interests of member libraries, librarians, trustees and friends.

This brief is submitted in the hope that it will assist the Court in deciding to grant certiorari in this case and rule on the important public issues presented therein. The American Library Association and the Iowa Library Association have obtained the written consent of both the Petitioner and Respondent to the filing of this amici curiae brief.*

The interests of the Iowa and American Library Associations in this case relate directly to the central issue presented—whether the conscious determination of a state legislature that the "contemporary community standards" of the state do not require prohibition of the distribution of arguably "obscene" materials to adults can be disregarded by a federal court and jury in the context of a prosecution for an alleged violation of the federal statute prohibiting distribution of "obscene" materials through the United States mails, 18 U. S. C. § 1461.

In 1974, the Iowa Legislature voted to decriminalize the distribution of arguably "obscene" materials to adults within Iowa by enacting Chapter 725 of the Code of Iowa. The petitioner was convicted in a jury trial in the District Court for the Southern District of Iowa on September 9, 1975, for seven violations of the federal statute prohibiting distribution of "obscene" materials through the United States mails, 18 U. S. C. § 1461, and sentenced to three years imprisonment, of which all but six months were suspended. The petitioner was placed on three years probation. The mailings involved all occurred totally within the State of Iowa.

* True copies of the letters evidencing such consent have been lodged in the Clerk's Office.

The District Court refused to acquit the petitioner despite the failure of the government to present any evidence of the "local community standard" by which to measure the "obscene" character of the materials he distributed and refused to rule that the appropriate standard was established by the Iowa Legislature which, in Chapter 725 of the Code of Iowa, had limited the criminal regulation of "obscenity" to distributions to minors. Petitioner appealed the District Court's rulings to the Eighth Circuit Court of Appeals which affirmed per curiam.

The rulings of the District Court and the Court of Appeals permitted the jurors to substitute their own, wholly subjective and unascertainable standard of "obscenity" for the express "contemporary community standard" established by the Iowa Legislature. That result has broad and serious implications for libraries and librarians.

Every library collection includes many works having sexual content, which might arguably be called "obscene" under some subjective standard. These works are frequently transmitted through the mails in connection with inter-library loans and in the library acquisition process. Thus, potentially every work with sexual content in a library collection exposes a librarian to criminal prosecution under federal law, regardless of the fact that the legislature of the state in which the library is located has expressly decided to decriminalize the distribution of "obscene" material to adults.*

Additionally, the Iowa and American Library Associations have a direct interest in this case in furthering the role of librarians as guardians of the freedom to read. The American library is an institution unique to American culture and tradition.

* While libraries and librarians are not engaged in "sexploitation" or the distribution of materials such as those in connection with which petitioner was convicted, the well-recognized "sexual revolution" has been reflected in current literature and periodicals. The public interest in sexual matters makes it logical and necessary for libraries to have materials with sexual content. Some of these materials, such as serious sex education books, are quite explicit.

Libraries are repositories of information and knowledge and are established to preserve and disseminate the records of the world's cultures.

In providing this service in the free society mandated by our Constitution, it is and has been the responsibility of libraries to make available materials presenting all points of view concerning the problems, issues and attitudes of our time. Consequently libraries and librarians have historically resisted efforts to limit their collections only to those materials reflecting attitudes, ideas, and library styles bearing the imprimatur of governmental authority or the approval of a prevailing majority of the populace. As a result, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

This function cannot be fulfilled if libraries and librarians are threatened with the prospects of prosecution under unstated, subjective standards of "obscenity" adopted by the federal courts and juries, despite lawfully designated state "contemporary community standards" decriminalizing the distribution of arguably "obscene" matter. Confronted with the prospects of criminal prosecution, it is beyond question that libraries and librarians will tread a cautious path, omitting from their collections all materials which might possibly be attacked as "obscene." Such a self-censorship program must necessarily suppress constitutionally protected material, thereby violating the First Amendment rights of libraries, librarians, publishers, authors and the people they serve.

It is this interest in the freedom to read and in the preservation of library resources that prompts the American Library Association and the Iowa Library Association to urge the Court to grant certiorari in this case.

REASONS FOR GRANTING THE WRIT.

THIS COURT SHOULD DECIDE THE IMPORTANT CONSTITUTIONAL ISSUE RAISED BY THE IOWA STATUTE'S DECRIMINALIZATION OF "OBSCENITY" AND THE FEDERAL COURT'S SUBSTITUTION OF A DIFFERENT "LOCAL COMMUNITY STANDARD" IN FEDERAL PROSECUTIONS IN IOWA.

The Iowa District Court and the Court of Appeals' resolution of the conflict between Iowa's decision to decriminalize "obscenity" in Iowa and a federal prosecution under 18 U. S. C. § 1461 for an intrastate mailing of allegedly "obscene" matter underscores the necessity for a ruling by this Court on the issue of what community standard should be applied in a federal "obscenity" prosecution.

The courts below improperly relied upon this Court's decision in *Hamling* v. *United States*, 418 U. S. 87 (1974), in reaching their decision to substitute a federal community standard for the express community standard of non-"obscenity" declared by the Iowa Legislature. In *Hamling*, the Court expressly extended the local "contemporary community standard" test adopted in *Miller* v. *California*, 413 U. S. 15 (1973),* to federal prosecutions under 18 U. S. C. § 1461 and stated:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to

* In citing to the prevailing Supreme Court definition of "obscenity", the Iowa and American Library Associations intend no endorsement of the Court's definition. Even under that definition, it is impossible to delineate the unprotected from the protected. What appeals to prurient interests, is offensive, or lacks serious value depends upon the viewer or reader. Librarians generally have no knowledge as to the specific purpose for which an individual is utilizing a given library work. Indeed, any requirement that librarians make such an inquiry would create a hostile, oppressive environment which itself would "chill" access to constitutionally protected works.

> permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." 418 U. S. at 105.

But, the statement in *Hamling* was made in the context of an 18 U. S. C. § 1461 prosecution for distributions of allegedly "obscene" materials from California to unspecified places throughout the United States. California, the state of origin and the forum state, had adopted a statewide community standard, but left the determination of the content of that standard to the trier of fact. The standards of the states in which the materials were received are not ascertainable from the opinion. The Court did not state what standard applied, it simply noted:

> "Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw. But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide." *Id.* at 105-06.

At least as to California's local community standards, *Hamling* involved no conflict with state law. In contrast, here Iowa, the state of origin and receipt and the forum state, had chosen to adopt a statewide community standard which expressly determined that nothing is "obscene" for adults in Iowa. *Hamling* provides no guidance one way or the other concerning whether this state standard should be applied in an 18 U. S. C. § 1461 prosecution. Yet, the ruling below, that the state standard can be disregarded, creates a direct conflict between federal and state law.

More such conflicts can be expected. This Court has expressly approved state deregulation of "obscenity."

> "[T]he States, of course, may follow such a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer. . . ." *Paris Adult Theater I* v. *Slaton*, 413 U. S. 49, 64 (1973).

Since the issuance of this Court's *Miller* line of cases*, the following states have decriminalized the distribution of "obscene" materials to adults. In addition to Chapter 725 of the *Code of* Iowa, *see* the similar statutes of New Mexico, *N. M. Stat. Ann.* ch. 40 § 50(1)-(8) (Supp. 1975); South Dakota, *S. D. C. L.* § 22-24-28 (Supp. 1975); Vermont, 13 *V. S. A.* §§ 2801-2807 (Supp. 1975); and West Virginia, *W. Va. Code Ann.* ch. 61 § 8A(1)-(7) (Cum. Supp. 1975). Hawaii has repealed its obscenity law, *Hawaii Rev. Stat.* ch. 37 § 712-1212 repealed SL 1973, C. 136 § 10. Further, the State of Alaska regulates only the distribution of "objectionable" comic books. *Alaska Stat. Ann.* §§ 11.40.160-11.40.180 (1973).

In light of changing attitudes towards victimless crimes in general, and "obscenity" in particular, deregulation is not surprising. Rather, it is likely that other states will opt for deregulation simply because "obscenity" laws are "so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts. . . ." *United States* v. *Reidel*, 402 U. S. 351, 357 (1971). The issues presented in this case are thus ripe for decision by the Court.

This case squarely presents the conflict inherent when a federal community standard is applied to wholly intrastate activity in total disregard of a state's legislative standard. The Court should take this opportunity to resolve the important public issues presented, because the resolution of that conflict by

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* *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theater I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973).

the courts below places libraries and librarians in an intolerable situation.*

A librarian can never know in advance what local community standard will be applied. If the state in which a library is located has chosen to deregulate the distribution of "obscenity," how can librarians determine what the local community standards are? Presumably, hard core pornography will be readily available in the community.

Moreover, where arguably "obscene" materials are sent interstate through the mails, *i.e.*, when making an inter-library loan, two standards may apply—that at the point of shipment or that at the point of receipt. If the standard at the point of receipt controls, how is the librarian to know what the local standard is of a community with which he or she is not familiar? The Court's decision in *Hamling* does not answer these vital questions.

The District Court and Court of Appeals' answer, leave the determination of the standard to the discretion of the jury, serves only to subject librarians to possible prosecution under unstated, subjective standards of "obscenity", notwithstanding the existence of explicit state "community standards" decriminalizing the distribution of "obscene" matter. The existence of dual "contemporary community standards" thus renders the definition of "obscenity" under 18 U. S. C. § 1461 hopelessly vague. There is no fair notice of what is prohibited in this situation.

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* The Court recently denied certiorari in *Danley* v. *United States*, 523 F. 2d 369 (9th Cir. 1975), *cert. denied*, 44 U. S. L. W. 3469 (February 23, 1976), which also involved a conflict between Oregon's deregulation of "obscenity" and an 18 U. S. C. § 1461 prosecution. However, the record there reflected interstate shipments of the allegedly "obscene" materials, and is distinguishable on that basis. Nonetheless, that decision further supports the necessity for a ruling by this Court at this time on the issues presented in this case.

The judicially sanctioned abrogation of a valid state or local community standard invites self-censorship, a result clearly disfavored by this Court. As stated in *Smith* v. *California*, 361 U. S. 147, 154 (1959):

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

Self-censorship by librarians is even more virulent in its effect on the public and its right to read. Confronted with the prospect of criminal prosecution under differing standards, the librarian will be coerced to "err on the side of caution" and to purge his collection of all works having sexual content.

It is not the purpose of this brief to argue the legal merits of the issue posed by petitioner. At the appropriate time the American and Iowa Library Associations are prepared to support their contention that the federal courts improperly substituted a "federal community standard" in this prosecution for the conscious determination of the state legislature that the "contemporary community standards" in Iowa do not require a prohibition on the distribution of arguably "obscene" materials to adults. The purpose of this brief is to persuade this Court of the importance of this issue to librarians and to all other persons concerned with the dissemination of literary and other works.

The loss which will result from purges by librarians of their library collections will not be merely a loss of commercial profits, but a loss of public access to knowledge, to ideas, to artistry and to literary experience. It will be an irreparable loss for there is no judicial review of the self-censorship decisions which of necessity will result.

CONCLUSION.

We respectfully urge that the Court grant certiorari in this case.

Respectfully submitted,

WILLIAM D. NORTH,
KATHLEEN H. WALL,
Attorneys for American Library Association and the Iowa Library Association.

Of Counsel:
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200 East Randolph Drive,
Chicago, Illinois 60601,
(312) 861-2000.

Dated April 10, 1976.

APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1439

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 10, 1976.
CERTIORARI GRANTED JUNE 21, 1976.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1439.

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX TO APPENDIX.

DOCKET ENTRIES

Date	Proceedings
March 26, 1975	Indictment.
March 26, 1975	Clerk's Court Minutes (Grand Jury Presentment).
March 27, 1975	Summons with Marshal's Return.
April 2, 1975	$5,000.00 OR bond.
April 2, 1975	Appearance of counsel.
April 2, 1975	Clerk's Court Minutes on arraign.
April 2, 1975	Order setting trial for 4-28-75.
April 25, 1975	Motion of deft. for continuance.
April 25, 1975	Order continuing trial.
May 16, 1975	Appearance of Frerich as counsel.
May 16, 1975	Order on Omnibus Hearing.
July 10, 1975	Order setting trial 9-8-75 at 9:30 A.M.
September 8, 1975	Deft's. Proposed Questions for Prospective Jurors.
September 8, 1975	Deft's. Trial Brief.
September 8, 1975	Jury Challenge Sheet.
September 8, 1975	Clerk's Court Minutes—1st Day of Trial.
September 9, 1975	Clerk's Court Minutes—2nd Day of Trial.
September 9, 1975	Instructions to the Jury.
September 9, 1975	Verdict Forms.
September 9, 1975	Receipt for Letter from the C. C. A.
September 11, 1975	Four Subpoenas for the Pltf. with Marshal's Return.
September 16, 1975	Order Granting the Deft. an Additional 7 Days to File his Motion for New Trial.
September 17, 1975	Deft's. Motion for a New Trial.
September 18, 1975	Pltf's. Resistance to Motion for New Trial.
September 18, 1975	Certificate of Service By Mail.

October 14, 1975—Order Denying Deft's. Motion for a New Trial.
October 14, 1975—Clerk's Court Minutes on Sentencing.
October 14, 1975—Judgment & Commitment.
October 14, 1975—Notice of Appeal by Deft.
October 17, 1975—Order In Re: Deft's. Sentence of Probation.
October 29, 1975—Agreed Statement of Appeal Pursuant to Rule 10(d) FRAP.
October 31, 1975—Transcript of Hrg. Deft's. Motion for Judgment of acquittal, renewal thereof, & ruling of Court. (Loose in file.)

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Iowa.

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* JERRY LEE SMITH, d/b/a Intrigue, *Defendant.*	Criminal No. 75-46 (T. 18 U. S. C. § 1461)

INDICTMENT

THE GRAND JURY CHARGES:

Count I

That on or about the 1st day of February 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail, according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope bearing a return address of Box 1364, Des Moines, Iowa, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs which depict nude men and women engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

Count II

That on or about the 25th day of June 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a

Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail, according to the directions thereon, to Jay Weber, Box 541, Mount Ayr, Iowa 50854, certain nonmailable matter, that is, an envelope with the return address of Box 1364, Des Moines, Iowa, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs depicting numerous nude males and females engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm and advertising literature.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

Count III

That on or about the 27th day of June 1974, at Des Moines, in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope bearing the return address of Box 1364, Des Moines, Iowa 50305, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs depicting numerous nude males and females engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm and advertising literature.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

Count IV

That on or about the 10th day of July 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to Jay Weber, Box 541, Mount Ayr, Iowa 50854, certain nonmailable matter, that is, an envelope with the return address of Box 1364, Des Moines, Iowa 50305, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances that is, a motion picture film entitled "Lovelace" depicting a nude male and a nude female engaged in explicit sex acts of masturbation and simulated sex acts of intercourse, fellatio, and cunnilingus and photographs depicting nude males and females engaged in simulated sex acts of intercourse, fellatio, and cunnilingus.

This is in violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

Count V

That on or about the 30th day of July 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon to Jay Weber, Box 541, Mount Ayr, Iowa 50854, certain nonmailable matter, that is, an envelope bearing a return address of Box 1364, Des Moines, Iowa 50305, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a motion picture film entitled "Terrorized Virgin" depicting one nude female

and two nude males engaged in explicit sex acts of fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

Count VI

That on or about the 30th day of July 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs depicting numerous nude males and females engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

THE GRAND JURY FURTHER CHARGES:

Count VII

That on or about the 2nd day of October 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith, d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope bearing the return address of Box 1364, Des Moines, Iowa 50305, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine

entitled Intrigue containing photographs depicting numerous nude males and females engaged in explicit sex acts of masturbation, bondage, fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

/s/ ELDON BOSWELL,
Foreman.

A true bill.

/s/ (Illegible)
United States Attorney.

IN THE UNITED STATES DISTRICT COURT.

* * (Title omitted in Printing) * *

DEFENDANT'S PROPOSED QUESTIONS FOR PROSPECTIVE JURORS

1. Are any members of the panel a member of or are in sympathy with any organization which has for its purpose the regulating or banning of alleged obscene materials?

2. Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

(The following individual questions are requested for each juror who answers the above question in the affirmative.)

3. Where did you acquire such information?

4. State what your understanding of those contemporary community standards are?

5. In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity.

6. State what your understanding of those laws are?

FULTON, FRERICHS & NUTTING
616 Lafayette St., P. O. Box 2427
Waterloo, IA 50705
Attorneys for Defendant
By /s/ C. A. FRERICHS
C. A. Frerichs

IN THE UNITED STATES DISTRICT COURT.

* * (Title omitted in Printing) * *

DEFENDANT'S TRIAL BRIEF

1. The definition of obscenity is not a question of fact, but one of law; the word "obscene" as used in 18 U. S. C. Section 1461 is a legal term of art.

Hamling v. *United States*, 94 S. Ct. 2887, 2908 (1974)

2. The first standard for testing the constitutionality of legislation regulating obscenity is whether the average person, *applying contemporary community standards*, would find that the work, taken as a whole, appeals to the prurient interest.

Miller v. *California*, 93 S. Ct. 2607 (1973)

3. In defining obscenity, 18 U. S. C. Section 1461 incorporates the *Miller* test of the "average person", applying contemporary community standards.

Hamling v. *United States*, 94 S. Ct. 2887, 2901 (1974)

4. A principal concern in requiring that a judgment as to obscenity be made on the basis of "contemporary community standards" is to insure that the material is judged neither on the basis of each juror's personal opinion or by its effect on a particularly sensitive or insensitive person or group.

Hamling v. *United States*, 94 S. Ct. 2887, 2902 (1974)

5. In obscenity case tried in Federal District Court, a judicial district is the "community", in which the jurors will draw in determining contemporary community standards.

Hamling v. *United States*, 94 S. Ct. 2887, 2901 (1974)

6. Although not required as a matter of constitutional law, the State of Iowa can constitutionally proscribe obscenity in terms of a "statewide standard".

Miller v. *California*, 93 S. Ct. 2607 (1973)

Hamling v. *United States*, 94 S. Ct. 2887, 2901 (1974)

7. The State of Iowa by the enactment of Chapter 725 of the Iowa Code, adopted statewide "community standards" for the determination of obscenity.

Chapter 725, Code of Iowa

8. Sections 725.1, 725.2 and 725.3 of the Code of Iowa set forth the "community standards" that the judgment of whether materials are obscene or not is dependent on the circumstances surrounding the dissemination of the materials rather than a subjective community judgment on the contents of the materials.

Sections 725.1, 725.2 and 725.3 of the Code of Iowa

9. Section 725.9 of the Iowa Code specifically excludes the application of any other "community standard" other than the circumstances of the materials dissemination standards set forth in Chapter 725 in determining the question of obscenity in the State of Iowa.

Section 725.9, Code of Iowa

10. A federal court is prohibited from allowing a jury to base an obscenity decision on a "community standard" other than those "community standards" specifically enunciated by a state by constitutional mandate of the 10th Amendment which reserves such police powers to the State.

10th Amendment to the United States Constitution

11. When a criminal defendant's guilt or non-guilt of a crime depends on a jury's independent knowledge of what the contemporary community standards are within the judicial district in which the jury is sitting, due process requires that the defendant be able to inquire whether a prospective juror has any such independent knowledge of said contemporary community standards and whether that knowledge is correct or not.

14th Amendment to the United States Constitution

12. When a criminal defendant's guilt or non-guilt of a crime depends on a jury's independent finding of what the

community standards are within the judicial district in which the jury is sitting, due process entitles a criminal defendant to ascertain at the time of the jury selection just what community standard the jury will apply at trial.

14th Amendment to the United States Constitution

FULTON, FRERICHS & NUTTING
616 Lafayette St., P. O. Box 2427
Waterloo, IA 50750
Attorneys for Defendant
By /s/ C. A. FRERICHS
C. A. Frerichs

UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

JURY TRIAL

On this 8th day of September, 1975 this case came on for 1st day of trial and the issues having been duly presented to the Court and Jury by Allen L. Donielson and Paul A. Zoss attorneys for the Plaintiff and C. A. Frerich Attorneys for the Defendant and the Court being fully advised in the premises,

It Is Ordered and Adjudged as Follows: Court in session at: 9:50 A.M. Jury impanelled. The Jury was admonished by the Court. Opening Statement by Counsel for both Parties. In absence of the Jury. Legal matters discussed. Deft. made a Motion In Limine. Pltf. responded. The Court ruled evidence in re: Cts. 2 and 3 are admitted. The remaining evidence is limited. Evidence for Pltf. proceeded with and in absence of the Jury. Legal Matters discussed. With the Jury present. Pltf's. evidence resumed and concluded. Pltf. rests. Deft's. evidence proceeded with the right to make Motions later on Court recessed at 4:35 P.M. until 9:30 A.M. Sept. 9, 1975.

/s/ LEON T. MANN,
Deputy Clerk

UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

JURY TRIAL

On this 9th day of September, 1975 this case came on for 2nd day of trial and the issues having been duly presented to the Court and Jury by Allen L. Donielson and Paul A. Zoss Attorneys for the Plaintiff and C. A. Frerich Attorneys for the Defendant and the Court being fully advised in the premises,

It Is Ordered and Adjudged as Follows: Court in session at: 9:25 A.M.

In absence of the Jury Deft. Moved for Judgment of Acquittal. The Court overruled the Motion. Other Legal Matters also discussed. With the Jury present. Deft's evidence resumed and Stipulation by Counsel in re: Deft's Exhibits H, I, J, K, L & M. Deft. rests and reserved the right to make Motions at a later time. Closing Arguments by Counsel. Court's Instructions to the Jury. Alternate Juror was excused. Jury retired to deliberate at 3:30 P.M. Deft. renewed his Motion. Motion overruled by the Court. The Jury returned with their Verdicts at 6:15 P.M. Verdicts of Guilty on all 7 Counts. The Jury was Polled. The Court Ordered a Pre-Sentence Report. Continued on same Bond. Sentencing set for Oct. 6, 1975, at 1:30 P.M. Instructions Filed. Verdicts Filed. (List of Exhibits attached Filed)

/s/ LEON T. MANN,
Deputy Clerk

	Pltf. Witnesses		Pltf. Exhibits	O	A
1.	John Funaro, Clerk P.O.	1.	P. O. Box App.	√	√
2.	William Bell, Custodian of Records P. O. 1971	2.	App. for Mail Permit #271	√	√
3.	Walt Anderson (Knows def. & mail under permit)	3.	Mailing under Permit #271	√	√

4.	Stewart Schwab (Count 1) Postmaster Guthrie Center	4.	Original Mailing to John Leffler	√ √
		4A.	May—Intrigue	√ √
		5.	Money Order for Sub.	√ √
	(Count 3)	6.	Envelope to Leffler	√ √
		6A.	Intrigue Magazine	√ √
		6B.	Modern Miss	√ √
		6C.	Confidential New	√ √
		6D.	Model Directory	√ √
		6E.	Correspondence Exchange	√ √
		6F.	Provocative	√ √
		6G.	Linda Lovelace	√ √
		6H.	Group Sex	√ √
		6I.	Vibro-Stim Penis	√ √
		6J.	200 Explicit	√ √
		6K.	Hard Acts	√ √
		6L.	This Note	√ √
		6M.	Sizzling Books	√ √
		6N.	Sensational	√ √
		6O.	Linda Lovely	√ √
		6P.	European Porno	√ √
	(Count 6)	7.	Envelope-Leffler	√ √
		7A.	Intrigue	√ √
	(Count 7)	8.	Envelope-Leffler	√ √
		8A.	Magazine Intrigue	√ √
		8B.	Hard Action	
		8D.	Sizzling Books	
		8E.	Envelope	
		8F.	Precision Crafted	
		8G.	Sensational New	
		8H.	Low Sale	
		8I.	Over 3000 Foundation or Ex. No. 4 only	
5.	W. R. Willige	9.	Money Order	√ √
6.	Marion Euritt, P. O. Mt. Ayr (Count 2)	10.	Envelope-Weber	√ √
		10A.	Magazine-Intrigue	√ √

	10B.	European Porno	√ √
	10C.	Group Sex	√ √
	10D.	Sensational	√ √
	10E.	200 Explicit	√ √
	10F.	Linda Lovely	√ √
	10G.	Provocative	√ √
	10H.	Lovelace	√ √
	10I.	Intrigue	√ √
	10J.	Application	√ √
	10K.	Vibro-Stim Penis	√ √
	10L.	Sizzling Books	√ √
	10M.	Hard Action	√ √
	10N.	New	√ √
	10O.	Model Directory	√ √
	10P.	Correspondence Exch.	√ √
	10Q.	Modern Miss	√ √
	10K.	Thank You	√ √
(Count 4)	11.	Money Order—Jerry Weber	√ √
	12.	Film Envelope	√ √
	12A.	Film Box	√ √
	12B.	Film	√ √
	12C.	Three people picture	√ √
	12D.	Three people picture	√ √
	12E.	Two people picture	√ √
	12F.	Two people picture	√ √
	12G.	Four people picture	√ √
	12H.	Two people picture	√ √
	12I.	Linda Lovelace	√ √
	12J.	Linda Lovelace	√ √
(Count 5)	13.	Money Order—Jerry Weber	√ √
	14.	Film Envelope	√ √
	14A.	Film Box	√ √
	14B.	Film	√ √
	14C.	Picture	√ √

7. Tom Bates

Contents Count 1-Ex. 4
Contents Count 2-Ex. 10
Contents Count 3-Ex. 6
Contents Count 4-Ex. 12
Contents Count 5-Ex. 14
Contents Count 6-Ex. 7
Contents Count 7-Ex. 8

(Count 2) 15. Screw No. 259

Then offer all except 1, 2 & 3

Court Exhibit

1.	Letter 8/18/72 (Not to Jury)	√ √

Deft. Witnesses	Deft. Exhibits	O	A
1. William Perry	A Paper sack	√	√
	A-1 Porno Magazine	√	√
	A-2 Porno Magazine	√	√
	A-3 Porno Magazine	√	√
	B Paper sack	√	√
	B-1 Film	√	√
	B-2 Film	√	√
	B-3 Porno Magazine	√	√
	B-4 Porno Magazine	√	√
	C Paper sack	√	√
	C-1 Film	√	√
	C-2 Publication	√	√
	D Paper sack	√	√
	D-1 Publication	√	√
	E Paper sack	√	√
	E-1 Publication	√	√
	F Paper sack	√	√
	F-1 Publication	√	√
	F-2 Publication	√	√
	G Copy of Chap. 725 Iowa Code	√	√
	H News Ad	√	√
	I News Ad	√	√
	J News Ad	√	√
	K News Ad	√	√
	L News Ad	√	√
	M News Ad	√	√

IN THE UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury, the Court gives you the following instructions.

INSTRUCTION No. 1

Now that you have heard the evidence and arguments the time has come to instruct you as to the law governing this case. You are to consider all of the instructions together and apply them as a whole to the facts as you find them to have been established by the evidence and return your verdict accordingly.

You as jurors are the sole judges of the facts. No language used by the Court in these instructions and no statements, conduct, remarks, or rulings of the Court during the progress of the trial should be considered by you as an indication that the Court has any opinion as to the facts of the case or what your verdict should be.

You are to follow the instructions now given you in your deliberations. You are not to be concerned with the wisdom of any rule of law. Regardless of your opinion as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION No. 2

In this case a Federal Grand Jury has returned an indictment against the defendant, Jerry Lee Smith d/b/a Intrigue, charging as follows:

Count 1

That on or about the 1st day of February 1974, at Des Moines in the Southern District of Iowa, Jerry Lee Smith,

d/b/a Intrigue, knowingly did use and cause to be used the mails for the mailing and carriage in the mails, and knowingly did cause to be delivered by mail according to the directions thereon, to John Leffler, Box 291, Guthrie Center, Iowa 50115, certain nonmailable matter, that is, an envelope bearing a return address of Box 1364, Des Moines, Iowa, containing obscene, lewd, lascivious, indecent, filthy and vile articles, matters, things, devices and substances, that is, a magazine entitled Intrigue containing photographs which depict nude men and women engaged in explicit sex acts of masturbation, fellatio, cunnilingus, intercourse and orgasm.

This is in violation of Title 18, United States Code, Sections 1461 and 2.

Count II

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461 and 2 in that on or about the 25th day of June 1974 he mailed certain nonmailable matter, that is, a magazine entitled Intrigue, to Jay Weber, Box 541, Mount Ayr, Iowa 50854.

Count III

This count charges the defendant in language similar to that in count I with violatiaon of 18 U. S. C. §§ 1461 and 2 in that on or about the 27th day of June 1974 he mailed certain nonmailable matter, that is, a magazine entitled Intrigue, to John Leffler, Box 291, Guthrie Center, Iowa 50115.

Count IV

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. § 1461 in that on or about the 10th day of July 1974, he mailed certain nonmailable matter, that is, a motion picture film entitled "Lovelace" to Jay Weber, Box 541, Mount Ayr, Iowa 50854.

Count V

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461

and 2 in that on or about the 30th day of July 1974, he mailed certain nonmailable matter, that is, a motion picture film entitled "Terrorized Virgin" to Jay Weber, Box 541, Mount Ayr, Iowa 50854.

Count VI

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461 and 2 in that on or about the 30th day of July 1974, he mailed certain nonmailable matter, that is, a magazine entitled Intrigue, to John Leffler, Box 291, Guthrie Center, Iowa 50115.

Count VII

This count charges the defendant in language similar to that in count I with violation of 18 U. S. C. §§ 1461 and 2 in that on or about the 2nd day of October 1974 he mailed certain nonmailable matter, that is a magazine entitled Intrigue, to John Leffler, Box 291, Guthrie Center, Iowa 50115.

To this indictment the defendant has entered a plea of not guilty which places upon the Government the burden of establishing the guilt of the defendant beyond a reasonable doubt.

INSTRUCTION NO. 3

An indictment is but a formal method of accusing a defendant of a crime, and should not be considerd by you as evidence in arriving at your verdict. A defendant is presumed to be innocent of the charge and this presumption of innocence remains with the defendant unless and until he is proven guilty beyond a reasonable doubt. The defendant is not called upon to prove his innocence.

The burden is always upon the government to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant.

INSTRUCTION No. 4

You will have observed that in the indictment the phrase "on or about" a certain date is used. It is not necessary that the Government prove the act to have occurred on that exact date. It is necessary in that connection only that the act be proved to have occurred within a reasonable time before or after that date.

INSTRUCTION No. 5

A reasonable doubt of guilt means a doubt founded upon reason and common sense. It means a doubt which, without being sought after, fairly and naturally arise in your mind after a fair and candid consideration of all of the evidence or lack of evidence. It is a doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be of such convincing character that a reasonable person would be willing to rely and act upon it unhesitatingly. It does not mean a forced or strained or unnatural doubt, or one arising from sympathy. Proof of guilt to a mathematical certainty or beyond the possibility of a doubt is not required. If upon full consideration of all the evidence or lack of evidence pertaining to the charge, you do not feel a confidence amounting to a moral certainty that the defendant is guilty, then you should acquit the defendant. If, however, after a full consideration of the evidence, you have an abiding conviction amounting to a moral certainty that the defendant is guilty, then the Government has established its case beyond a reasonable doubt.

Whenever in these instructions it is stated that the Government must "establish" a certain matter or proposition, or "prove" a certain matter or proposition, it means that the Government must establish such matter or proposition beyond a reasonable doubt.

INSTRUCTION No. 6

Section 1461 of Title 18 of the United States Code provides in part that:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared * * * to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, * * *

shall be guilty of an offense against the laws of the United States.

INSTRUCTION No. 7

Three essential elements are required to be proved beyond a reasonable doubt for each count of the indictment in order for the Government to establish the offenses charged:

First: That the subject matter of the particular count under consideration is obscene, as will hereinafter be defined.

Second: That for each count of the indictment, the accused willfully deposited or caused to be deposited, the envelopes and packages containing the advertisements, pictures and films, for mailing and delivery by the Post Office Establishment of the United States; and

Third: That for each count of the indictment, the accused had knowledge of the contents of the envelope at the time it was deposited for mailing and delivery.

INSTRUCTION No. 8

Although the indictment includes the words of the statute, namely, the adjectives "obscene", "lewd", "lascivious", "indecent", and "filthy", the gist of the offense alleged in the indictment is the charge that the defendant willfully misused the United States mail for the delivery of obscene materials.

"Obscene" means something which deals in sex in such a manner that the predominant appeal is to prurient interest. A

prurient interest is a morbid intereset in sex as distinguished from a candid interest in sex.

In determining whether the subject matter of the count under consideration is obscene as thus defined you must apply the following tests: (a) whether, the average person, applying contemporary community standards would find that the subject matter, taken as a whole appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated or patently offensive representations of masturbation, excretory functions or lewd exhibition of the genitals, and (c) whether the subject matter taken as a whole lacks serious literary, political or scientific value.

If in applying these tests to the subject matter of the count under consideration, you find a yes answer to each question, you will then have found that such matter is obscene and you will consider the other essential elements of the crime. If your anwser is no as to any of the tests then the matter is not obscene within the definition given you and you should acquit the defendant.

INSTRUCTION No. 9

The phrase "average person, applying contemporary community standards" as used in test (a) in the preceding instruction requires some explanation. The community with which we are concerned is coextensive with the jurisdiction of this Court, roughly that part of the State of Iowa lying south of U. S. Highway 30.

Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say, by society at large or people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. In determining the view of average persons of that community, you are each

entitled to draw on your own knowledge of the views of the average person in the community from which you come as well as consider the evidence presented as to the state law on obscenity and materials available for purchase in certain stores as shown by the evidence.

What may appear to some people to be in bad taste or offensive may appear to be amusing or entertaining to others. Obscenity is not a matter of individual taste. The personal opinion of a juror as to the material in question here is not the proper basis for a determination whether or not the material is obscene. As stated above the test is how the average person of the community as a whole would view the material.

INSTRUCTION No. 10

The third test to be applied, in determining whether advertisements, pictures and films are obscene, is whether when taken as a whole, they lack serious literary, artistic, political or scientific value. If they have serious literary, artistic, political or scientific value, then they are not obscene, even though they may appeal to prurient interest in sex in a manner substantially beyond the acceptable limits of candor established by the current standards of the community as a whole.

INSTRUCTION No. 11

Freedom of expression is fundamental to our system, and had contributed much to the development and well being of our free society. In the exercise of the constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely and publicly, so long as the expression does not fall within the area of obscenity. However, the constitutional right to free expression does not extend to the expression of that which is obscene.

INSTRUCTION No. 12

If you find that the material named in the indictment is obscene as defined in Instruction 8, and if you find that the defendant deposited the material in the mail knowing or having notice at the time of its contents, the offense is complete, although the defendant himself did not regard the material as being forbidden by law to be carried in the mails.

INSTRUCTION No. 13

The offense charged in the indictment is that the accused willfully deposited, or caused to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, packages and envelopes containing one or more obscene pictures, addressed to the addressee named.

Proof as to willfully depositing, or causing to be deposited, for mailing and delivery, may be wholly circumstantial. The evidence need not show that the accused personally mailed the packages and envelopes in evidence. As to the alleged misuse of the mails, it is enough if the evidence in the case established beyond a reasonable doubt that the accused willfully caused the deposit for mailing or delivery of packages and envelopes containing one or more obscene advertisements, pictures and films, as charged in the indictment.

INSTRUCTION No. 14

An act is done knowingly if done voluntarily and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one would be convicted for an act done because of mistake, accident, or other innocent reason.

INSTRUCTION No. 15

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence—such as the testimony of an eye-witness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

INSTRUCTION No. 16

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While eye-witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. Thus, upon considering all the evidence adduced at trial, the jury may, but is not required to, draw the inference that an accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.

In determining the issue as to intent the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

INSTRUCTION No. 17

The matter of the punishment of the defendant in the event of conviction should not be taken into consideration by you. This is the responsibility of the Court and not the jury. It is your duty to determine whether the defendant is guilty or not guilty. It is the duty of the Court to determine what his punishment should be in case of conviction.

INSTRUCTION No. 18

You are the sole judges of the weight of the evidence, the credibility of the witnesses, and the conclusions to be drawn from the facts and circumstances proved. In passing on the credibility of the witnesses and in weighing their testimony you may and should consider their appearance and conduct on the witness stand; their interest or lack of interest in the result of the trial; the motives, if any, actuating them as witnesses; their candor, fairness, bias, or prejudice; their knowledge, recollection and means of knowledge of the matters whereof they speak; the reasonableness or probability of their statements, or want thereof; and each fact and circumstance proved, thus giving to the testimony of each witness and to each fact and circumstance such weight and such only as ought reasonably and justly to be given in view of all the evidence.

INSTRUCTION No. 19

A defendant in a criminal case may take the witness stand in his own behalf or he may elect not to take the witness stand. In this case the defendant elected not to take the witness stand. The decision not to take the witness stand does not create any presumption against the defendant. You should not permit the fact of such decision to weigh in the slightest degree against the defendant, nor should you permit such fact to enter into your deliberations and discussions. Such a decision is merely an exercise of a defendant's constititional right to remain silent.

INSTRUCTION No. 20

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. An inconclusive trial is always undesirable. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION No. 21

Upon retiring at the close of the case your first duty is to elect a foreman. The foreman acts as chairman. It is his duty to see that discussion is carried on in an orderly and proper fashion, that the issues are fully and freely discussed, and that every juror is given an opportunity to express his views. When ballots are to be taken, he will see that it is done. He will sign the forms of verdict which are in accord with your decision. He will sign any written requests made by the jury to the Court. Requests regarding instructions are not encouraged. Experience teaches that questions regarding the law are normally fully covered in the instructions and the jury is encouraged to examine them very carefully before making any further requests of the Court. The masculine gender has been used for convenience, but either a man or a woman may be foreman of the jury.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the

jury room, to announce an emphatic opinion in a case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved and the juror may later hesitate to recede from an announced position even when it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth.

/s/ (Illegible)
United States District Judge

INSTRUCTION No. 26

Submitted to you with these instructions are two forms of verdict for each of the seven counts of the indictment. You are to consider the guilt of the defendant as to each count separately, and have your foreman sign the appropriate form for each count.

IN THE UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

MOTION FOR A NEW TRIAL.

Defendant moves the Court to grant him a new trial for the following reasons:

1. The Court by adverse rulings to Defendant's requested questions to the Jury panel refused to make inquiries whether prospective jurors had any knowledge of the contemporary community standards referred to in *Miller* v. *California* and *Hamling* v. *United States* and whether that knowledge if any, was correct or not. Further the Court advised counsel that he would refuse counsel the right to make such inquiries.

2. The Government in the prosecution of this case submitted only evidence showing the mailing and receiving of certain materials in the mail.

3. The Government produced no evidence purporting to show what the contemporary community standards referred to in *Miller* v. *California* and *Hamling* v. *United States* are for the United States District Court for the Southern District of Iowa.

4. Defendant introduced into evidence in this cause Chapter 725 of the Code of Iowa which set forth community standards for the State of Iowa. Said legislation provides that in the geographical area of the State of Iowa "obscenity" is a function of circumstances of the materials dissemination.

5. The Government produced no evidence showing Defendant's violation of the community standards set forth in Chapter 725.

6. For the above reasons the Government has wholly failed to sustain its burden of proof showing that the materials cited in the indictment offend the community standards of the United

States District Court for the Southern District of Iowa and accordingly has failed to sustain its burden of proof in this case as a matter of law.

7. Further, if the community standards for the United States District Court for the Southern District of Iowa are in fact different from that community standards set out in Chapter 725 of the Iowa Code, a judgment of guilty in this matter offends due process in that Defendant was unable to ascertain whether a community standard existed in the minds of the jurors and if it existed, what it was and if it was correct and was therefore precluded from being able to present a fair defense to the accusations of the Government under the doctrine announced in *Chambers* v. *Mississippi*.

FULTON, FRERICHS & NUTTING,
Attorneys for Defendant,
616 Lafayette St.,
Waterloo, Iowa,

By: /s/ C. A. FRERICHS,
C. A. Frerichs.

Copy sent to:

US Attorney Allen Donielson, US Federal Courthouse, East 1st & Walnut St. Des Moines, Iowa 50309

IN THE UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

RESISTANCE TO MOTION FOR A NEW TRIAL.

Comes Now the plaintiff, United States of America, and resists the Motion for New Trial. Each and all of the points raised in that motion were raised in connection with rulings by the Court during trial. No new reasoning has been advanced to support any of these points, and the Court's original rulings are fully supported by the law and by the record.

Accordingly, for the foregoing reasons, plaintiff respectfully requests that the defendant's Motion for New Trial be overruled.

ALLEN L. DONIELSON,
United States Attorney

/s/ PAUL A. ZOSS,
Paul A. Zoss,
Assistant U. S. Attorney,
113 U. S. Courthouse,
Des Moines, Iowa 50309,
Telephone: (515) 284-4400.

IN THE UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

ORDER.

On September 9, 1975, a federal jury found defendant Jerry Lee Smith d/b/a Intrigue guilty on seven counts of mailing obscene material in violation of 18 U. S. C. § 1461. The Court now has before it Mr. Smith's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure providing that a new trial may be granted "if required in the interest of justice". The Court however believes that the interest of justice does not so require in this situation, and the motion will be denied.

Defendant's motion is grounded upon the assertion that the Government has failed to sustain its burden of proof to show that the materials involved affronted contemporary community standards. Several reasons are given why this is claimed to be true. First, the Court's refusal to query, or allow counsel to query, prospective jurors as to their knowledge of any such standards; second, the absence of any evidence by the Government purporting to show what the proper standard is; and third, the Government's failure to show any violation of what defendant claims to be the binding standard in this regard—Chapter 725 of the Iowa Code. Defendant also argues that if the standards for the jurisdiction of this court are in fact different from the standard supposedly set forth in Chapter 725 of the Iowa Code, a guilty verdict offends due process in that jurors were not questioned on the subject before being impanelled.

The Court will first consider the ramifications on this entire matter of the State of Iowa's decision not to regulate obscenity insofar as adults are concerned. Defendant implies that the contemporary community standard has thus been fixed and as such should be deemed controlling for purposes of a federal obscenity prosecution. Such an argument, however, assumes too

much. We are dealing with a federal law which neither incorporates nor depends upon the laws of the states. United States v. Hill (5th Cir., 1974), 500 F. 2d 733. Although the Iowa legislature has chosen as a matter of policy to deregulate the dissemination of obscene materials, except where minors are involved, the federal government has not followed a similar course. Regardless of the state laws, federal proscriptions still remain upon the mailing of obscene materials. In an effort to formulate a workable definition of obscenity for use in federal prosecutions, a "contemporary community standard" has been included as an element thereof, but it does not inexorably follow that such standards are determined by what a state legislature has elected to tolerate. The fact that a state has chosen to permit a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the jury. (See the unpublished opinion of United States v. Danley (9th Cir., 1975), No. 75-1948.) Therefore, any arguments being advanced which are premised upon the controlling nature of the Iowa law in a federal prosecution must fail.

The Court is unable to agree that the failure to elicit or have elicited from prospective jurors the extent of their knowledge of a contemporary community standard violated any of defendant's rights. A juror's role in cases of this character is revealed in the following passage from Hamling v. United States (1974), 418 U. S. 87, 105:

> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community of vicinage from which he comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence

in this case as to what constitutes a contemporary community standard and how much such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of "reasonableness" be necessary where that standard is an essential element.

Lastly, the Court cannot agree that the Government need introduce evidence of a community standard to sustain its burden of proof. As the Supreme Court has stated, "in the cases in which this Court has decided obscenity questions since *Roth* [Roth v. United States, 354 U. S. 476], it has regarded the materials as sufficient in themselves for the determination of the question". Ginzburg v. United States (1966), 383 U. S. 463, 465. The materials introduced by the Government in the trial of this case can and do speak for themselves. See also, United States v. Manarite (2d Cir., 1971), 448 F. 2d 583 and United States v. Wild (2d Cir., 1970), 422 F. 2d 34.

In view of the foregoing analysis, IT IS HEREBY ORDERED that the motion of defendant Jerry Lee Smith d/b/a Intrigue for new trial be denied.

Signed this 14 day of October, 1975.

/s/ W. C. STUART,
W. C. Stuart,
U. S. District Judge Southern District of Iowa.

UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

JUDGMENT AND PROBATION/COMMITMENT ORDER.

In the presence of the attorney for the government the defendant appeared in person on this date October 14, 1975.

Counsel

☐ Without counsel However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ With Counsel C. A. Frerich

Plea

☐ Guilty, and the court being satisfied that there is a factual basis for the plea, ☐ Nolo Contendere, ☒ Not Guilty.

There being a verdict of ☐ Not Guilty, Defendant is discharged; ☒ Guilty.

Finding & Judgment

Defendant has been convicted as charged of the offense(s) of violation of Title 18, Sections 1461 & 2, U. S. Code; as charged in counts 1, 2, 3, 4, 5, 6 and 7, in the Indictment filed herein:

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and

ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years.; and on condition that the defendant be confined in a jail type or treatment institution for a period of six (6) months, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for three (3) years, on count 1. The defendant while on probation will be subject to all the rules and regulations and the statutes governing probation and probationers and will be under the supervision of the United States Probation Officer of this court for such period. Title 18, Section 3651, U. S. Code. On each of counts 2, 3, 4, 5, 6 and 7, the same sentence as imposed under count 1, to run concurrently with count 1.

The defendant was advised of his right to appeal. Bond on Appeal is $5,000.00 Own Recognizance.

/s/ M. STUART,
United States District Judge.

10-14-75.

IN THE UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

NOTICE OF APPEAL.

Notice is hereby given that Jerry Lee Smith, defendant above-named, hereby appeals to the United States Court of Appeals for the Eighth Circuit the judgments of guilty rendered by the jury herein and the sentence imposed by the Court on the 14th day of October, 1975, and from all orders and judgments inherent therein.

Dated October 14, 1975.

/s/ JERRY LEE SMITH,
Jerry Lee Smith,
Defendant,

/s/ C. A. FRERICHS,
C. A. Frerichs,
Attorney for Defendant,
Fulton, Frerichs & Nutting,
616 Lafayette Street, P. O. Box 2427,
Waterloo, Iowa 50705.

10–15–75: I hereby certify that I mailed a copy of the foregoing Notice of Appeal to Allen L. Donielson, U. S. Attorney; and Paul A. Zoss, Assistant U. S. Attorney, Room 113 U. S. Courthouse E. 1st & Walnut Streets, Des Moines, Iowa 50309, attorneys for plaintiff; and to Virgil Moore, 2454 SW 9th, Des Moines, Iowa 50315; and Mr. C. A. Frerich, 616 Lafayette, Waterloo, Iowa 50705 attorneys for defendant.

R. E. Longstaff,
Clerk.

/s/ GERTRUDE DANIELS, *Deputy Clerk.*

Copy to Court Reporter Melvin Durgin.

IN THE UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

STATEMENT OF THE CASE.

1. By virtue of an indictment filed March 26, 1975, defendant was charged with seven counts of placing non-mailable matter in the United States Mails in violation of Title 18, United States Code, Section 1461 and 2.

2. Trial commenced on September 8, 1975, and the jury reached a verdict of guilty on all seven counts on September 9, 1975.

3. On October 14, 1975, defendant was sentenced to a term of three years imprisonment on each count; all but six months of this term was suspended. The defendant was also sentenced to three years probation on each count. The sentences on each count were to run concurrently. On the same day, defendant filed his appeal.

4. Prior to the selection of the jury, on September 8, 1975, defendant filed a list of proposed questions for prospective jurors, a copy of which is attached hereto. The court accepted in substance Requested Instruction No. 1 but denied all other requests. In addition, the trial court denied defendant the right to make oral inquiries of a similar nature to the jury. The transcript of the Voir Dire is made a part of this record for appeal.

5. Evidence offered by the Government established the following facts:

a. At Des Moines, in the Southern District of Iowa, on or about February 1, 1974, defendant knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 4 and 4A.

b. At Des Moines, in the Southern District of Iowa, on or about June 25, 1974, defendant knowingly did cause

to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 10, 10A, 10B, 10C, 10D, 10E, 10F, 10G, 10I, 10J, 10K, 10L, 10M, 10N, 10O, 10P, 10Q, and 10R.

c. At Des Moines, in the Southern District of Iowa, on or about June 27, 1974, defendant knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 6, 6A, 6B, 6C, 6D, 6E, 6F, 6H, 6I, 6J, 6K, 6L, 6M, 6N, 6O, and 6P.

d. At Des Moines, in the Southern District of Iowa, on or about July 10, 1974, defendant knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 12, 12A, 12B, 12C, 12D, 12E, 12F 12G, 12H, 12I, and 12J.

e. At Des Moines, in the Southern District of Iowa, on or about July 30, 1974, defendant knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 14, 14A, 14B, and 14C.

f. At Des Moines, in the Southern District of Iowa, on or about July 30, 1974, defendant knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 7 and 7A.

g. At Des Moines, in the Southern District of Iowa, on or about October 2, 1974, defendant knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 8 and 8A.

6. Further evidence offered by the Government established that the names and addresses of the addressees listed in Paragraph 2 above are fictitious. All mail sent to these names and addresses was delivered through the postal system to the Postmaster serving each address.

7. It is stipulated by the parties that the communities of Des Moines, Iowa, Guthrie Center, Iowa, and Mount Ayr,

Iowa, are all located within the Southern Judicial District of Iowa in the Federal judicial system.

8. Evidence offered by the defendant established the following facts:

a. Trial Exhibits A, A-1, A-2, and A-3 were available for purchase by adults at the Davenport Swingers World, Inc. Book Store in Davenport, Iowa on August 8, 1975.

b. Trial Exhibits B, B-1, B-2, B-3 and B-4 were available for purchase by adults at the Adult Dream Book Store in Des Moines, Iowa on August 12, 1975.

c. Trial Exhibits C, C-1, C-2 were available for purchase by adults at the Bachelors Library in Des Moines, Iowa on August 12, 1975.

d. Trial Exhibits D and D-1 were available for purchase by adults at the Adult Center Book Store in Des Moines, Iowa on August 12, 1975.

e. Trial Exhibits E and E-1 were available for purchase by adults at the Red Eye Book Store in Des Moines, Iowa on August 12, 1975.

f. Trial Exhibits F, F-1 and F-2 were available for purchase by adults at the Discount Adult Book Store in Davenport, Iowa on August 14, 1975.

g. Pursuant to stipulation of the parties as to foundation Trial Exhibit G, a copy of Chapter 725 of the Iowa Code, was introduced into evidence.

h. Pursuant to stipulation of the parties as to foundation Trial Exhibit H (advertisements appearing in the *Des Moines Register and Tribune* for May 22, 1975) was introduced into evidence.

i. Pursuant to stipulation of the parties as to foundation Trial Exhibit I (advertisements appearing in the *Des Moines Register and Tribune* for June 4, 1975) was introduced into evidence.

j. Pursuant to stipulation of the parties as to foundation Trial Exhibit J (advertisements appearing in the *Des Moines Register and Tribune* for August 15, 1975) was introduced into evidence.

k. Pursuant to stipulation of the parties as to foundation Trial Exhibit K (advertisements appearing in the *Des Moines Register and Tribune* for August 15, 1975) was introduced into evidence.

l. Pursuant to stipulation of the parties as to foundation Trial Exhibit L (advertisements appearing in the *Des Moines Register and Tribune* for August 16, 1975) was introduced into evidence.

m. Pursuant to stipulation of the parties as to foundation Trial Exhibit M (advertisements appearing in the *Des Moines Register and Tribune* for August 22, 1975) was introduced into evidence.

8. At the conclusion of the Government's case, defendant dictated into the record a motion for judgment of acquittal. Defendant renewed his motion at the close of all the evidence. A transcript of said motions and the Court's rulings thereon are attached hereto.

9. Prior to sentencing, on September 17, 1975, defendant filed a motion for a new trial, a copy of which is attached hereto. This motion was denied by Order dated October 14, 1975, a copy of which is attached hereto.

10. The parties agree that all trial exhibits referred to herein shall constitute a part of the record on appeal.

STATEMENT OF POINTS RAISED BY APPELLANT IN THIS APPEAL.

Under the circumstances of this case:

(1) The Court erred in refusing defendant's requested questions for prospective jurors and refusing to allow defendant to make similar inquiries.

(2) The Court erred in not granting defendant's motions for judgment of acquittal made at the conclusion of the government's evidence and at the close of all evidence.

(3) The Court erred in not granting defendant's motion for a new trial.

/s/ ALLEN L. DONIELSON,
Allen L. Donielson,
United States Attorney
113 U. S. Courthouse,
Des Moines, Iowa 50309,
Tel: 515-284-4400,

/s/ C. A. FRERICHS,
C. A. Frerichs,
616 Lafayette Street,
Waterloo, Iowa 50705,
Attorney for Defendant.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
St. Louis, Mo. 63101

February 13, 1976

Mr. C. A. Frerichs
Fulton, Frerichs & Nutting
616 Lafayette Street
Waterloo, Iowa 50705

Ms. Kathleen H. Wall
& Messrs. Tefft W. Smith
& William D. North
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Hon. Allen L. Donielson
and Mr. Paul A. Zoss
Office of U. S. Attorney
113 U. S. Courthouse
Des Moines, Iowa 50309

Re: No. 75-1802. United States v. Jerry Lee Smith.

Dear Sir:

Enclosed herewith, for use of counsel, copy of the opinion of this Court filed today in the above case. Judgement of this Court in accordance with the opinion is also entered today.

Very truly yours,

/s/ ROBERT C. TUCKER
Robert C. Tucker
Clerk

vk

enc.

P. S. The opinion will not be printed or published in accordance with directions received from the Court.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 75-1802

JERRY LEE SMITH, d/b/a Intrigue, *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.
} Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 15, 1976
Filed: February 13, 1976

Before CLARK, *Associate Justice*, Retired,* BRIGHT and HENLEY, *Circuit Judges*.

PER CURIAM:

Jerry Lee Smith was convicted in the United States District Court for the Southern District of Iowa on seven counts of placing non-mailable matter in the United States mails in violation of 18 U. S. C. §§ 1461-2 and was sentenced to three years imprisonment on each count to run concurrently, all of which was suspended except for six months. On this appeal Smith asserts two errors by the trial court: (1) In refusing to ask or permit counsel to ask certain questions of the jury panel as to the contemporary community standards existing in the Southern District of Iowa relative to the depiction of sex and nudity in magazines and books; and (2) in not applying Iowa law in the determination of the contemporary community standards applicable to the case.

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

1. The questions that Smith wished propounded to the jury panel have to do with the juror's knowledge of the contemporary community standards existing in the Southern District of Iowa; where he acquired such information; his understanding of what the contemporary community standards are; if, in arriving at such understanding, he took into consideration the laws of the State of Iowa regulating obscenity; and finally, what is his understanding of those laws.

In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a "right to inquire of the juror what 'contemporary community standards' the juror has knowledge of, if any, and just which of the multiple 'contemporary community standards' the juror will apply to him, and the nature of the 'contemporary community standards' which the juror believes have application to him." But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is "one of law * * * a legal term of art," *Hamling* v. *United States*, 418 U. S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the "reasonable" or "average" person in other areas of decision making. Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are inborn and often undefinable.

This is not to say that no questions can be asked the jury panel in this area, but only that the specific ones tendered here

were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc.

2. This case appears to be controlled by *United States* v. *Danley*, 523 F. 2d 369 (9th Cir. 1975), and *United States* v. *Hill*, 500 F. 2d 733 (5th Cir. 1974); and the Supreme Court of the United States has passed on the second question in *Hamling* v. *United States*, 418 U. S. 87 (1974), where the Chief Justice wrote:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.

This prosecution deals with a federal statute and state law has no bearing on its decision. On the contrary, the federal statute depends on federal law as laid down by the Supreme Court. It has incorporated contemporary community standards in the determination of obscenity. In this connection we note that the trial court admitted into evidence a copy of Iowa's obscenity statute. This was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do. We are bound by the jury decision.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

CHAPTER 725.
OBSCENITY AND INDECENCY.

725.1 DEFINITIONS. As used in this section and sections 725.2 to 725.10, unless the context otherwise requires:

1. *"Obscene material"* is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

2. *"Material"* means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

3. *"Disseminate"* means to transfer possession, with or without consideration.

4. *"Knowingly"* means being aware of the character of the matter.

5. *"Sado-masochistic abuse"* means the infliction of physical or mental pain upon a person or the condition of a person being fettered, bound or otherwise physically restrained.

6. *"Minor"* means any person under the age of eighteen.

7. *"Sex act"* means any sexual contact, actual or simulated, between two or more persons, either natural or deviate, or between a person and an animal, by penetration of the penis into the vagina or anus, or by contact between the mouth and genitalia or anus, or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

725.2 DISSEMINATION AND EXHIBITION OF OBSCENE MATERIAL TO MINORS. Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exeeed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.3 ADMITTING MINORS TO PREMISES WHERE OBSCENE MATERIAL IS EXHIBITED. Any person who knowingly sells, gives, delivers or provides a minor with a pass or admits a minor to premises where obscene material is exhibited is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.4 CIVIL SUIT TO DETERMINE OBSCENITY. Whenever the county attorney of any county has reasonable cause to believe that any person is engaged or plans to engage in the dissemination or exhibition of obscene material within his county to minors he may institute a civil proceeding in the district court of the county to enjoin the dissemination or exhibition of obscene material to minors. Such application for injunction is optional and not mandatory and shall not be construed as a prerequisite to criminal prosecution for a violation of sections 725.1 to 725.10.

725.5 EXEMPTIONS FOR PUBLIC LIBRARIES AND EDUCATIONAL INSTITUTIONS. Nothing in sections 725.1 to 725.10 prohibits the use of appropriate material for educational purposes in any accredited school, or any public library, or in any educational program in which the minor is participating. Nothing in said sections prohibits the attendance of minors at an exhibition or display or art works or the use of any materials in any public library.

725.6 SUSPENSION OF LICENSES OR PERMITS. Any person who knowingly permits a violation of section 725.2 or 725.3 to occur on premises under his control shall have all permits and licenses issued to him under state or local law as a prerequisite for doing business on such premises revoked for a period of six months. The county attorney shall notify all agencies responsible for issuing licenses and permits of any conviction under section 725.2 or 725.3.

725.7 EVIDENCE CONSIDERED. At a trial for violation of sections 725.2 and 725.3 the court may consider the material, and receive into evidence in addition to other competent evidence, the offered testimony of experts pertaining to:

1. The artistic, literary, political or scientific value, if any, of the challenged material.

2. The degree of public acceptance within the community of the material or material of similar character.

3. The intent of the author, artist, producer, publisher or manufacturer in creating the material.

4. The advertising promotion and other circumstances relating to the sale of the material.

725.8 AFFIRMATIVE DEFENSE. In any prosecution for disseminating or exhibiting obscene material to minors, it is an affirmative defense that the defendant had reasonable cause to believe that the minor involved was eighteen years old or more and the minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was eighteen years old or more or was accompanied by a parent or spouse eighteen years of age or more.

725.9 UNIFORM APPLICATION. In order to provide for the uniform application of the provisions of sections 725.1 to 725.-10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene

material shall be under the provisions of these sections, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974.

No. 75-1439

In the Supreme Court of the United States

OCTOBER TERM, 1975

JERRY LEE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not yet reported. The order of the district court (Pet. App. A4-A6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1976. On March 9, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including April 12, 1976, and the petition was filed on April 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the absence of a state statute prohibiting distribution of obscene materials to adults prohibits

federal prosecution under 18 U.S.C. 1461 for mailing obscene materials entirely within that state.

2. Whether 18 U.S.C. 1461 is unconstitutionally vague as applied.

3. Whether prospective jurors should have been questioned on *voir dire* as to their knowledge of contemporary community standards for determining whether allegedly obscene materials, taken as a whole, appeal to prurient interest.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on seven counts of mailing obscene material, in violation of 18 U.S.C. 1461. He was sentenced to concurrent terms of three years' imprisonment, with thirty months of that term suspended, and to concurrent three years' probation on each count. The court of appeals affirmed *per curiam* (Pet. App. A1-A3).

The evidence at trial[1] showed that between February and October 1974, petitioner mailed various issues of "Intrigue" magazine and other pamphlets from Des Moines, Iowa, to addresses in Mount Ayr and Guthrie Center, Iowa.[2] The magazines depict nude males and females engaged in masturbation, fellatio, cunnilingus, and sexual intercourse. On separate occasions in July 1974, petitioner mailed two films entitled "Lovelace" and "Terrorized Virgin," to Mount Ayr, Iowa. "Lovelace"

[1]The evidence at trial is not transcribed. The above summary of facts is drawn mainly from the Agreed Statement of the record on appeal filed in the court of appeals under Rule 10(d), Fed. R. App. P.

[2]All of the materials here involved were the subject of test purchases by postal authorities in Mount Ayr and Guthrie Center (Pet. 5-6).

depicted acts of masturbation and simulated acts of fellatio, cunnilingus, and sexual intercourse. "Terrorized Virgin" depicted two nude males and a nude female engaged in fellatio, cunnilingus, and intercourse.

ARGUMENT

1. Iowa prohibits distribution of obscene material only to minors, not to adults.[3] Petitioner argues (Pet. 8-18) that, in consequence, contemporary community standards within that state cannot be offended by distribution of obscene materials to adults; therefore, no federal obscenity prosecution under 18 U.S.C. 1461 for mailings of such materials wholly within the state is constitutionally permissible.

Petitioner misapprehends the function of the "contemporary community standards" element in the three-part test which guides triers of fact in both state and federal obscenity prosecutions. *Miller* v. *California*, 413 U.S. 15, 24; *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 129-130. That element controls the factual determination "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *." *Miller* v. *California*, *supra*, at 24. This is a factual test of the aim, effect and scope of the materials, not an inquiry into whether, as a matter of local community standards, distribution of materials found to have a prurient appeal should be tolerated.

The latter inquiry involves a quite different question of legislative policy, which is to be determined by the federal and state governments within their respective constitutional spheres of responsibility. Exclusion from the

[3]Section 725.2, Iowa Code Annotated (1975) (see Pet. App. A7-A10).

mails of material deemed offensive is a national responsibility that does not depend on state policy. See *United States* v. *Orito*, 413 U.S. 139, 144, n. 6.

Thus as was observed with respect to a similar claim (*United States* v. *Danley*, 523 F. 2d 369, 370 (C.A. 9), certiorari denied, No. 75-566, February 23, 1976):

> We deal with a federal law which neither incorporates nor depends upon the laws of the states. *United States* v. *Hill*, 500 F.2d 733 (5th Cir. 1974) [certiorari denied, 420 U.S. 952]. Rather, the federal law depends for its constitutionality upon definitions incorporating community standards. Community standards are aggregates of the attitudes of average people—people who are neither "particularly susceptible or sensitive . . . or indeed . . . totally insensitive." *Miller* v. *California, supra*, 413 U.S. at 33, 93 S.Ct. at 2620. The fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the trial court, and in this case the trial court did resolve it.[4]

See also *United States* v. *Slepicoff*, 524 F.2d 1244, 1248-1249 (C.A. 5), certiorari denied, No. 75-1226, May 24, 1976.

Petitioner's suggestion (Pet. 14) that state and federal juries would apply different "contemporary community standards" is a result of his confusion of the factual test for prurient appeal, with the issue of legislative policy toward obscenity. Iowa, as a matter of legislative policy,

[4]Although *Danley* involved interstate shipments of obscene materials, while intrastate mailings are involved here, that factor is not relevant to protection of the mails.

has determined not to make criminal the distribution of obscene materials to adults. But this is not because Iowa has decided that materials of the kind petitioner sold would not be recognized by the average person as appealing to prurient interest. It is because Iowa has decided, as a matter of legislative policy, not to bar distribution of such materials to adults. Indeed, a jury of Iowans applying the *Miller* standard in a state prosecution for distributing allegedly obscene materials to minors, under Iowa Code Sections 725.1 and 725.2 (Pet. App. A7-A8), would apply the same community standard test for prurient appeal as a jury of Iowans considering a federal prosecution under 18 U.S.C. 1461.

Moreover, a copy of the state obscenity statute was introduced at trial (Pet. App. A3). While we do not believe the admission of such evidence was necessary, it permitted the jury to consider what, if any, bearing the statute had on community standards. In these circumstances, petitioner's claim is foreclosed by the jury's verdict and provides no basis for further review.

2. Although petitioner now claims (Pet. 18-20) that 18 U.S.C. 1461 is unconstitutionally vague as applied to his case, because the jurors might have evaluated the materials subjectively, and thus unpredictably, he did not clearly raise this issue in the court of appeals. In any event, *Miller, supra*, requires that in cases under 18 U.S.C 1461, as in prosecutions under state law, jurors must be instructed to apply a standard which assesses the prurient appeal of the material from the standpoint of "the average person, applying contemporary community standards." *United States* v. *12 200-Ft. Reels of Film*, *supra*. That standard is as objective as is the "reasonable

person" test, which has become a fundamental criterion in Anglo-American law. *Hamling* v. *United States*, 418 U.S. 87, 104-105.[5]

3. Petitioner claims that on *voir dire* he should have been permitted to ask prospective jurors whether they had knowledge of contemporary community standards regarding obscenity, where they acquired such knowledge, what the standards were, and whether they had considered and understood the state obscenity statute (Pet. 20-21).

Petitioner's proposed questions concerning individual jurors' knowledge of community standards were improper. As this Court observed in *Hamling* v. *United States*, *supra*, 418 U.S. at 104-105:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

The district court correctly applied this reasoning (Pet. App. A6):

> A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence in this case as to what constitutes a contemporary community

[5]Petitioner does not suggest that the jury was inadequately instructed in this regard, nor does he assert any reason to believe jurors disregarded correct instructions. His claim that jurors assess community standards on a "subjective whim" (Pet. 19) is speculation.

> standard and how such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of "reasonableness" be necessary where that standard is an essential element.[6]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
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Attorneys.

JUNE 1976.

[6]As noted, *supra*, p. 5, the state obscenity statute was introduced for the jury's consideration. Moreover, the trial judge thoroughly inquired as to possible bias or prejudice of prospective jurors (J. Tr. 9-23). The questions proposed by petitioner would have added nothing to the fairness of the trial.

DOJ-1976-06

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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Dated: September 14, 1976.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The United States Court of Appeals for the Eighth Circuit directed that its per curiam opinion not be printed or published. The opinion is reproduced in the Appendix, at A. 43-46. The Federal District Court for the Southern District of Iowa issued an unreported order denying a motion for a new trial. (A. 32-34.)

JURISDICTION.

The jurisdiction of the Iowa District Court was based on 18 U.S.C. § 3231. The jurisdiction of the Court of Appeals was founded upon 28 U.S.C. § 1291.

The judgment of the Court of Appeals was entered on February 13, 1976. A Petition for a Writ of Certiorari was filed on April 10, 1976, and granted on June 21, 1976. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Did the refusal of a federal court and jury to adopt the "contemporary community standards," consciously established by the Iowa Legislature, as the test for measuring "obscenity" in a prosecution under 18 U.S.C. § 1461 for a wholly *intra*-Iowa mailing of allegedly "obscene" materials ignore this Court's prior decisions and defy fundamental principles of our federalist system?

2. Did the Court of Appeals, in ruling that jurors can disregard the conscious determination of their state legislature to deregulate the distribution of sexually related matter to consenting adults in Iowa, render 18 U.S.C. § 1461 unconstitutionally vague as applied?

3. Did the District Court's refusal at *voir dire* to probe the prospective jurors' knowledge of the "contemporary community standards" in Iowa deny petitioner due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED.

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED.

Chapter 725 of the Iowa Code prohibits only the distribution of "obscenity" to minors. The statute is exclusive and expressly precludes any prosecution for the distribution of materials to adults. The statute provides in pertinent part:

> "725.9 Uniform Application. In order to provide for the uniform application of the provisions of Sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no municipality, county, or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances and regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974." (A. 49-50.)

Chapter 725 of the Iowa Code is printed in its entirety in the Appendix, at A. 47-50.

The federal statute here at issue, 18 U.S.C. § 1461, provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made
>
> * * * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation or disposing thereof, or aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

STATEMENT OF THE CASE.

In 1974, the Iowa Legislature eliminated all regulation of the distribution of sexually related materials to consenting adults. Iowa Code Ann. ch. 725. (A. 47-50.) Prohibition remained only on the distribution of certain materials to minors, and the Legislature expressly foreclosed any other prohibitions within the state. *Id.* § 725.9. (A. 49-50.)

On March 26, 1976, the United States Grand Jury for the Southern District of Iowa returned an Indictment charging the petitioner Jerry Lee Smith with seven violations of the federal statute prohibiting distributions of "obscene" materials through the United States mails, 18 U.S.C. § 1461. (A. 3-7.) The petitioner pleaded not guilty. He was tried by a jury which convicted him of each count of the Indictment on September 9, 1975. (A. 13.) On October 14, 1975, petitioner was sentenced to three years imprisonment. All but six months of this sentence were suspended, and the petitioner was placed on three years probation. (A. 35-36.)

The mailings for which petitioner was prosecuted were all wholly within Iowa. (A. 38-41.) These mailings were made to federal postal drop boxes at the written request of Iowa postal service inspectors using fictitious names. (A. 39.) No evidence was ever adduced that the materials were sent by petitioner to another state or were received or viewed by minors or non-soliciting adults. The mailings were, therefore, lawful under Iowa law.

Petitioner submitted proposed *voir dire* questions to the District Court designed to determine what, if any, knowledge prospective jurors had of the "contemporary community standards" controlling the alleged "obscenity" of the materials distributed. (A. 8.) The District Court refused to ask these questions or permit petitioner to make his own inquiries of the prospective jurors. (A. 38.)

The Government offered no evidence at trial of any "contemporary community standards" governing the "obscenity" of the materials involved; it simply introduced the materials themselves. (A. 38-39.) Petitioner's motion for acquittal at the conclusion of the Government's case was denied. (A. 41.)

In defense, petitioner placed in evidence a copy of Chapter 725 of the Iowa Code and established that materials comparable to those for which he was being prosecuted were lawfully available for over-the-counter purchase throughout Iowa. (A. 40-41.) At the close of the evidence, the District Court denied petitioner's renewed motion for acquittal, based on the claim that the appropriate "contemporary community standards" for measuring the "obscenity" of the materials were established by the Iowa Legislature in Chapter 725 of the Iowa Code. (A. 41.)

The District Court then instructed the jurors, in determining whether the materials distributed were "obscene," "to draw on your own knowledge of the views of the average person in the community," but left them free to disregard Chapter 725 of the Iowa Code and the lawful availability of comparable materials in their community. (A. 23.) Petitioner's prior objections to the proposed instruction and his request for a direction of acquittal based on the Iowa statute had been denied.

After the guilty verdict was returned, petitioner moved for a new trial (A. 29-30), but the motion was denied. (A. 32-34.) Petitioner then appealed the District Court's rulings to the Eighth Circuit Court of Appeals. (A. 37.) The Court of Appeals affirmed per curiam.[1] (A. 44-46.) Petitioner sought a Writ of Certiorari, which was granted by this Court on June 21, 1976.

---

1. The Eighth Circuit Court of Appeals panel consisted of Mr. Justice Clark, Retired, sitting by designation, and Judges Bright and Henley.

SUMMARY OF THE ARGUMENT.

I.

This Court's prior decisions and our federalist system mandate reversal of petitioner Jerry Lee Smith's 18 U.S.C. § 1461 conviction for mailing allegedly "obscene" materials to consenting adults in Iowa. The Iowa Legislature's determination to deregulate the distribution of sexually related matter to Iowa adults sets the "contemporary community standards" that should have been applied by the District Court and jury in measuring "obscenity." That legislative determination precludes any finding that the materials distributed were "obscene."

This Court has expressly rejected "national" standards and established that "obscenity" is defined by the "contemporary community standards" of the community in which the distribution takes place. The Court has further declared that the contents of the community's standards can be determined by the state legislature. In setting those standards, the Court recognized the power of the state legislature to deregulate "obscenity" and foreclose any restraints on the *intrastate* distribution of sexually related materials.

Congress has never provided a definition of "obscenity" for 18 U.S.C. § 1461. This Court, to flesh out that statute, has explicitly extended the "contemporary community standards" test to 18 U.S.C. § 1461 prosecutions, designating the forum district as the geographic community. Here, the appropriate community was the Southern District of Iowa, a vicinage for which the "contemporary community standards" had been declared by the Iowa Legislature to preclude Jerry Lee Smith's prosecution for distributing sexually related materials to soliciting Iowa adults.

The District Court, however, permitted the individual jurors to disregard their state legislature's determination and convict Jerry Lee Smith based on their own views of what is "obscene" for Iowa adults. The Court of Appeals affirmed, relying on the notion that "[t]he fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within the state approve of the permitted conduct." That astounding assertion affronts the political structure of our democratic republic. Under our system, the power to declare the values that govern all citizens is delegated by the people to their elected representatives, subject only to the restraints of the ballot box. Thus, a statute is the ultimate statement of public policy—of the views of the people. As definitively stated by James Madison in *Federalist* No. 10:

> "The effect of [a republic is] to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."

At its essence, ours is a nation of laws, not men. Individual jurors are not free to rewrite the law based on a disagreement with their legislature's policy judgments, particularly in an area as emotional and constitutionally sensitive as "obscenity." This Court, recognizing the elusiveness of the legal concept of "obscenity," has rejected the notion that jurors have untrammelled discretion to determine what is "obscene." The Court has, therefore, directed that jurors be instructed on the law governing "obscenity." Here, the applicable law was declared by the jurors' own legislature, and that declaration was binding upon them.

The conclusive effect of the Iowa Legislature's statutory pronouncement is further compelled by the principles of cooperative federalism. As this Court has recognized, "obscenity" is a matter of traditional state, not federal, interest. Congress has not federalized "obscenity"; indeed, it has not even defined the term,

despite repeated reenactments of 18 U.S.C. § 1461. Rather, Congress has left the issue for determination by the Court.

This Court has rejected any need for national uniformity and adopted the community's standards of "obscenity" for purposes of 18 U.S.C. § 1461 prosecutions. The Court's incorporation of state "obscenity" law is consistent with this Court's historical practice of resorting to state law to flesh out the details of Congressional enactments. Deference to state law is especially proper where, as here, the interests involved are inherently local in character.

The Court of Appeals, in allowing the jurors to determine what community standards apply, effectively nullified Iowa law. Yet, under basic federalist precepts, federal supremacy exists only where Congress has clearly so ordained or the subject matter is intrinsically federal. Neither situation is present here. This was a wholly *intrastate* distribution; therefore, the exercise of federal supremacy is inconsistent with Jerry Lee Smith's legitimate expectation that his *intra*-Iowa distribution of sexually related materials to soliciting adults was governed by Iowa law.

This Court has recognized the need to harmonize state and federal statutory schemes. The tension between Iowa's deregulation of "obscenity" and Jerry Lee Smith's prosecution under 18 U.S.C. § 1461 for that *intra*-Iowa mailing is resolved by the adoption of Iowa law as the "contemporary community standards" for measuring "obscenity."

II.

The Court of Appeals' ruling that Jerry Lee Smith could not legitimately rely on state law in making an *intrastate* distribution of sexually related matter renders 18 U.S.C. § 1461 unconstitutionally vague, and, therefore, void as applied.

This Court had directed Jerry Lee Smith to measure his conduct in distributing sexually related matter by "contemporary community standards." Logically, then, Jerry Lee Smith must look to Iowa law to guide his conduct within Iowa. The record in this case reveals that hard core pornographic material was readily available for over-the-counter purchase throughout Iowa as permitted by Iowa law. Yet, despite the Government's failure to offer any evidence of a different community standard, the Court of Appeals ruled that the jurors could disregard these facts in convicting Jerry Lee Smith for a distribution in Iowa.

If state law can be ignored, how could Jerry Lee Smith determine the applicable community standards? Consultation with an expert has been declared of no value by this Court; a survey of community attitudes can be declared inadmissible; Jerry Lee Smith's own belief in the "nonobscenity" of the materials is legally irrelevant. In the final analysis, Jerry Lee Smith was prosecuted and sentenced to prison under unascertainable standards. He could not know that his *intra*-Iowa distribution of sexually related matter would result in incarceration until the jury issued its verdict at his criminal trial.

Hence, as applied by the Court of Appeals in this case, 18 U.S.C. § 1461 contravenes the essential due process requirement of fair notice. The absence of ascertainable standards makes the statute susceptible to arbitrary enforcement by prosecutors and capricious application by jurors. Given the dim and uncertain line between "obscenity" and protected speech, the conviction of Jerry Lee Smith for conduct lawful under Iowa law, if allowed to stand, will chill First Amendment rights.

III.

"Obscenity" is an emotional subject. Juror bias can be deeply engrained. Recognizing this fact and the obligation of the jurors in his 18 U.S.C. § 1461 prosecution to measure the "obscenity" of materials by the "contemporary community standards" in Iowa, Jerry Lee Smith requested the District Court on *voir dire* to determine whether the prospective jurors had any knowledge of those standards. The District Court refused to make such

inquiries, and the Court of Appeals affirmed. Those rulings deprived Jerry Lee Smith of his Sixth Amendment and due process rights to a competent, qualified and impartial jury.

Voir dire inquiry into prospective juror knowledge of the "contemporary community standards" is necessary to assure that the individual jurors are competent and qualified to make the objective determination required of them. Otherwise, an individual could be—as Jerry Lee Smith was—convicted through a verdict of "obscenity" based on the jurors' personal biases, rather than the community's standards.

ARGUMENT.

I.

THE "CONTEMPORARY COMMUNITY STANDARDS" IN IOWA ESTABLISHED BY THE STATE LEGISLATURE WERE IMPROPERLY DISREGARDED.

This case concerns the refusal of the courts below to require jurors to apply the "contemporary community standards" established by their state legislature as the test for measuring "obscenity" for a wholly *intra*-Iowa distribution of allegedly "obscene" materials. The Iowa Legislature declared that "contemporary community standards" in that state do not restrain the distribution of sexually related matter to consenting adults. Yet the courts below permitted the jurors to disregard their state's law and apply a subjectively devined "federal" standard to convict petitioner Jerry Lee Smith for mailing allegedly "obscene" materials to soliciting Iowa adults.

The District Court refused to acquit Jerry Lee Smith, and refused to instruct the jurors to acquit based on the existence of the Iowa law, notwithstanding the Goverment's failure to offer any evidence of a community standard in the Southern District of Iowa different from that established by the Iowa Legislature. Instead, the District Court allowed the jurors to legislate their own views of the community standards governing what is "obscene" in Iowa.

These rulings affirmed by the Court of Appeals constitute reversible error. Fundamental principles of our federalist system, binding on this Court, require that the Iowa Legislature's decision to deregulate the distribution of sexually related matter to consenting adults in Iowa must be applied by a federal court and jury in a prosecution under 18 U.S.C. § 1461 for an *intrastate* mailing of allegedly "obscene" materials to soliciting

adults. The Iowa law established the "contemporary community standards" against which the "obscenity" of the materials must be measured, and that law precludes any finding that the materials are "obscene."

A. A State Legislature Has the Power to Establish the "Contemporary Community Standards" Within Its Borders.

This Court has established the "contemporary community standards" test as the central element of the legal definition of "obscenity." In *Miller* v. *California,* 413 U.S. 15 (1973), the Court mandated that "obscenity" be judged with reference to the "contemporary community standards" of the "average person" in the community.

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

In establishing "contemporary community standards" as a substantive element of the legal definition of "obscenity," this Court held that the content of those "standards" is determined by the community itself. Thus, the Court expressly rejected a national standard in *Miller. Id.* at 32-33.

The Court recognized that the parameters of the "contemporary community standards" can be set by the state legislature. *Miller* ruled that California "could constitutionally proscribe obscenity in terms of a 'statewide' standard." *Hamling* v. *United States,* 418 U.S. 87, 105 (1974), clarifying *Miller* v. *California, supra.* In *Jenkins* v. *Georgia,* 418 U.S. 153, 157 (1974), the Court emphasized that "the States have considerable latitude

in framing statutes under [the "contemporary community standards"] element of the *Miller* decision." Indeed, the Court affirmed the right of a state legislature to preclude any more localized community standards, declaring that a state "may choose to define the standards in . . . precise geographic terms, as was done by California [using a statewide "community"] in *Miller." Id.*

Here, the Iowa Legislature explicitly legislated that the "contemporary community standards" of Iowa permit the distribution of sexually related materials to consenting adults. It further declared that its determination foreclosed any prohibition on such distributions by any "other governmental unit within this state." Iowa Code Ann. § 725.9. (A. 50.) In so doing, the Iowa Legislature followed a course specifically charted by this Court.

In *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 64 (1973), the Court expressly recognized the right of state legislatures to legalize the distribution of "obscenity."

> "The States, of course, may follow . . . a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer . . . ."

See *Memoirs* v. *Massachusetts,* 383 U.S. 413, 462 (1966) (White, J., dissenting). Indeed, *Miller* rejected the "national" standards test because, *inter alia,* a "local" standard would allow a state to apply a more permissive test.

> "The use of 'national' standards . . . necessarily implies that material found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." 413 U.S. at 32 n.13.

In *United States* v. *Reidel,* 402 U.S. 351, 357 (1971), the Court even suggested that such an approach may be the most "desirable."

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may ap-

peal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances."

B. The Iowa Legislature's Determination of the "Contemporary Community Standards" Within Its Borders Binds All Jurors, State and Federal.

Hamling v. *United States* expressly extended the "contemporary community standards" test to federal prosecutions under 18 U.S.C. § 1461:

"In *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973), a federal obscenity case decided with *Miller*, we said:

'We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller* v. *California, ante*, at 23-25. These standards are applicable to federal legislation.' *Id.*, at 129-130.

Included in the pages referred to in *Miller* is the standard of 'the average person, applying contemporary community standards.' In view of our holding in *12 200-ft. Reels of Film*, we hold that 18 U.S.C. § 1461 incorporates this test in defining obscenity." 418 U.S. at 105.

That the test does not vary between federal and state prosecutions is clear from *Miller* v. *California*. In summarizing the *Miller* holding, the Court stated:

"[O]bscenity is to be determined by applying 'contemporary community standards,' see *Kois* v. *Wisconsin*, [408 U.S. 229 (1972) (per curiam)] *supra*, at 230, and *Roth* v. *United States*, [354 U.S. 476 (1957)] *supra*, at 489, not 'national standards.'" 413 U.S. at 37.

The citation of both *Kois*, a state case, and *Roth*, a federal case, confirms that the same "contemporary community standards" should be applied in federal as well as state prosecutions.

The Court in *Hamling* determined that the geographic dimensions of the appropriate "community" for that federal prosecution were equivalent to the Southern District of California. 418 U.S. at 105-06. Accordingly, the appropriate "community" for this case was the Southern District of Iowa, a "vicinage" whose standards had been determined by the Iowa Legislature to preclude criminal prosecution for the distribution of sexually related materials to consenting adults. As Professor Schauer recently stated:

"In a federal prosecution under local standards, pursuant to *Hamling*, state statutes may be relevant evidence of community standards. If the state law of the relevant community does not make 'obscenity' a crime, or perhaps only includes minors, then the law, theoretically embodying the wishes of the community, should be probative as to the standards of the community. If the community does not make the activity a crime, it can be said that it does not offend the community. Under the proper circumstances, legislative history may also be admissible on the relationship between the statute and the standards or wishes of the state. Municipal ordinances may also be relevant, as would evidence of a consistent and explicit policy of nonenforcement, even though the statutes nominally exist." F. Schauer, The Law of Obscenity 134 (1976) (footnotes omitted).

Nonetheless, the Court of Appeals held that Iowa's legislative determination could be disregarded by federal jurors. It asserted:

"[S]tate policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do." (A. 46.)

Yet that statement is inconsistent with basic precepts of federalism and the essential character of our representative form of government, and with this Court's deliberate denationalization of "obscenity" and its express recognition of the right of a state to establish the governing "contemporary community standards" applicable to distributions within its borders.

C. Fundamental Federalist Principles Confirm the Propriety of Utilizing State Determined Community Standards in Federal "Obscenity" Prosecutions.

1. Jurors Cannot Rewrite the Law.

The Court of Appeals' decision relied on the notion that "[t]he fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within the state approve of the permitted conduct." *United States* v. *Danley*, 523 F.2d 369, 370 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1143 (1976). This astounding statement is repugnant to the political structure of a democratic republic. The legislature in a democratic republic is institutionally the voice of the people, subject to the political restraints inherent in the ballot box. James Madison in *Federalist* No. 10 definitively stated this proposition:

> "[W]hat are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? . . . [T]he most numerous party, or in other words, the most powerful faction must be expected to prevail.
>
> * * * * *
>
> "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society;

> but it will be unable to execute and mask its violence under the forms of the Constitution.
>
> * * * * *
>
> "The effect of [a republic is] to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose." *The Federalist* No. 10, at 79-82 (C. Rossiter ed. 1961) (J. Madison).

Mr. Chief Justice Warren, in the signal case of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), underscored these principles in upholding the "one-man, one-vote" concept:

> "State legislatures are, historically, the fountainhead of representative government in this country. . . . [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . .
>
> "Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. *Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.*" *Id.* at 564-65 (emphasis added).

The duly elected representatives of the people of Iowa in an unequivocable statement of public policy declared that statewide community standards permit the unfettered distribution of

sexually related materials between consenting adults. It is incomprehensible how twelve jurors—selected at random, not elected by their peers—can be claimed to be a better reflection of the community than their elected representatives. Mr. Justice Harlan, in *Mugler* v. *Kansas*, 123 U.S. 623, 660-61 (1887), stated:

> "Power to determine [questions of public morals, safety and health], so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government."

Under our system, a statute is the ultimate statement of public policy—of the views of the people. As Professor Bickel pointed out:

> "Law is more than just another opinion; not because it embodies all right values, or because the values it does embody tend from time to time to reflect those of a majority or plurality, but because it is the value of values. Law is the principal institution through which a society can assert its values." A. Bickel, The Morality of Consent 5 (1975).

Cf. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 12-14 (1936).

Thus, it is firmly established that ours is a government of laws, not men. Individual jurors are not free to rewrite the law. As long ago stated by the Court in *Sparf & Hansen* v. *United States*, 156 U.S. 51, 101-03 (1895):

> "Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. . . . When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions."

Indeed, this Court itself will not question the wisdom of actions taken by the elected representatives of the people. In

expressly sanctioning the right of state legislatures to deregulate "obscenity," the Court stated:

> " 'We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch . . . social conditions.' *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965)." *Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 64.

See *Lochner* v. *New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

Hence, as stated in *Berman* v. *Parker*, 348 U.S. 26, 32 (1954), "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." Here, the Iowa Legislature has conclusively determined the "contemporary community standards" governing the distribution of "obscenity" within Iowa. That determination cannot be disregarded by jurors on the basis of their disagreement with their legislature's policy judgments on a matter as emotional and constitutionally sensitive as "obscenity."

The Court of Appeals cited this Court's decision in *Hamling* v. *United States* as support for ruling that federal jurors can ignore their state's law in determining "obscenity" in a federal prosecution. The Court of Appeals paraphrased *Hamling*:

> " 'A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.' " (A. 46.)[2]

But *Hamling* actually refutes the Court of Appeals' ruling.

In the first place, *Hamling* explained that the rationale for the "contemporary community standards" test was precisely to pre-

2. The actual language in *Hamling* reads:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." 418 U.S. at 105.

vent "obscenity" judgments from being based on the personal bias of individual jurors.

> "This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment [of "obscenity"] be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." 418 U.S. at 107.

Indeed, this Court has firmly rejected the notion that jurors have "unbridled discretion" in determining "obscenity." *Jenkins* v. *Georgia, supra,* 418 U.S. at 160. As stated in *Hamling* v. *United States, supra,* 418 U.S. at 118, "[t]he definition of obscenity . . . is not a question of fact, but one of law; the word 'obscene,' as used in 18 U. S. C. § 1461, is not merely a generic or descriptive term, but a legal term of art." Consequently, this Court has directed that jurors considering "obscenity" be "guided always by limiting instructions on the law." *Miller* v. *California, supra,* 413 U.S. at 30. Here, the governing *law* made nothing "obscene" for consenting adults in Iowa, and it was, therefore, the duty of the District Court so to instruct the jury.

Second, the statement in *Hamling,* relied on by the Court of Appeals, was made in the context of an 18 U.S.C. § 1461 prosecution for unsolicited, *interstate* distributions of allegedly "obscene" materials. California, the state of origin and the forum state, had adopted a statewide community standard of prohibiting the distribution of explicit sexually oriented materials to California adults. The Court did not indicate what "contemporary community standards" applied; it simply noted:

> "Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw. But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide." 418 U.S. at 105-06.

At least as to California's community standards, there was no conflict between an 18 U.S.C. § 1461 prosecution and California law. Therefore, *Hamling* did not present the situation at bar, where the state legislature has declared that nothing could be "obscene" under the prevailing "contemporary community standards."

2. Under Federalist Principles, Potential Conflicts Between Federal and State Law Are Properly Reconciled by Deference to State Law in Matters of Local Concern.

The potential conflict between Iowa's decision to deregulate the distribution of sexually related material within its borders and a prosecution under 18 U.S.C. § 1461 for an *intra*-Iowa mailing is properly reconciled by deference to Iowa law. In the spirit of cooperative federalism, this Court has often turned to state law to flesh out the details of Congressional enactments. As stated in *DeSylva* v. *Ballentine,* 351 U.S. 570, 580 (1965):

> "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law."

There, state law was used to determine the eligibility of an illegitimate child to a renewal right under the Federal Copyright Act.

Adoption of state law is especially appropriate where the interests are predominantly local in character. As noted in *Cooley* v. *Board of Wardens,* 53 U.S. (12 How.) 299, 320 (1851), some subjects are "such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."

3. "Obscenity" Is a Matter of State, Not Federal, Interest.

This Court has recognized that the regulation of "obscenity" is predominately a matter of state, not federal, interest. The interests in regulating "obscenity" were defined by the Court in *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 57-58.

> "[W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests 'other than those of the advocates are involved.' *Breard* v. *Alexandria,* 341 U.S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." [Footnote omitted.]

These interests are the traditional province of the individual states reserved to them by the Tenth Amendment. As stated in *Miller* v. *California, supra,* 413 U.S. at 29:

> "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power [over "obscenity"] reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day."

No independent federal interests have ever been identified by Congress or this Court. Indeed, Mr. Justice Harlan contended that any interests of the federal government are attenuated and subservient to its primary obligation to assure adequate protection of First Amendment rights.

> "[T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. . . .

> "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do." *Roth* v. *United States,* 354 U.S. 476, 504-05 (1957) (Harlan, J., concurring and dissenting).[3]

Notably, in *Miller,* the Court recognized that the exercise of state authority over the distribution of sexually related materials within a state would offend no federal interests, especially given the traditional local interests at stake.

> "[T]he application of domestic state police powers in this case did not intrude on any congressional powers under Art. 1, § 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Appellant's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines." 413 U.S. at 32-33 n.13.

In making this statement, the Court referred back to its first footnote, where the Court had expressly stated that the California statute at issue there did not "create any 'direct, immediate burden on the performance of the postal functions. . . .'" *Id.* at 17-18 n.1. Here, the distributions for which petitioner was sentenced to prison were all *intrastate.*

The Court of Appeals' reliance upon the "controll[ing]" (A. 46) decisions of *United States* v. *Hill,* 500 F.2d 733 (5th Cir. 1974), *cert. denied,* 420 U. S. 952 (1975), and *United States*

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3. Mr. Justice Harlan in *Memoirs* v. *Massachusetts,* 383 U.S. 413, 457 (1966) (dissenting opinion), noted "a limited [federal] interest" in excluding hard core pornography from the mails. He identified that interest in terms of preventing the "thwarting of state regulation." *Id.* at 457-58 n.2. But in this case, because Iowa has deregulated the distribution of "obscenity" to consenting adults in that state, an assertion of a federal interest would effectively *thwart* Iowa law.

v. *Danley, supra,* is, thus, misplaced. These cases concerned *interstate* distributions.

Hill involved a prosecution under 18 U.S.C. §§ 1462 and 1465 for *interstate* distribution of allegedly "obscene" materials by common carrier. Prior to this prosecution, a three-judge federal court ruled Florida's statutory scheme regulating "obscenity" invalid for procedural defects. *Meyer* v. *Austin,* 319 F. Supp. 457 (M.D. Fla. 1970), *appeal dismissed,* 413 U.S. 902 (1973). Consequently, Florida had no "obscenity" statute in effect during the *Hill* prosecution. The Fifth Circuit Court of Appeals affirmed the District Court's refusal to instruct the jury that, as a result, nothing could be "obscene" in Florida. That ruling was correct. The Florida Legislature had expressed a policy that community standards required the control of "obscenity." That the enactment was procedurally defective, hence, invalid, did not void the policy statement.

Danley, another federal prosecution under 18 U.S.C. §§ 1462 and 1465, also involved *interstate* shipments of allegedly "obscene" materials. Oregon, where the shipments originated, had deregulated the distribution of "obscenity" within its borders. In rejecting the argument that it was bound by the policy of Oregon, the Court observed:

> "In judging the community standard, the court, dealing as it was with laws regulating the mails and interstate commerce, properly considered the community as embracing more than the State of Oregon. While under *Miller* v. *California, supra,* taken in conjunction with *United States* v. *12 200-Ft. Reels of Super 8 MM. Film,* 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), it is permissible in federal prosecution to define the state as a community, it is clear from *Hamling* v. *United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), that consideration may be given to standards without the state." 523 F.2d at 370.

That analysis may be proper in the context of an *interstate* distribution, but it has no application for the purely *intrastate* conduct involved in this case.

4. The Absence of Any Definition of "Obscenity" as Used in 18 U.S.C. § 1461 Requires Resort to State Law.

The statute here at issue, 18 U.S.C. § 1461, does not even provide a definition of "obscenity," and contains no expression of the controlling community standard. Congressional silence on the appropriate standards for defining "obscenity" itself creates a presumption in favor of the adoption of state law. For example, in the securities law area, federal courts have looked to the forum state to obtain the statute of limitations for suits brought under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b), which is silent on the point. The premise for this procedure is stated in *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395 (1946).

> "As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. [Cites omitted.] The implied absorption of State statutes of limitations within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles."

In the tort area, the Court looked to state law for a definition of the term "next of kin" used in the Federal Employer's Liability Act.

> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law." *Seaboard Air Line Railway* v. *Kenney,* 240 U.S. 489, 493-94 (1916).

In *Board of County Commissioners* v. *United States,* 308 U.S. 343 (1939), state law was applied in determining whether

a judgment for the United States in an action to recover taxes illegally exacted from an Indian should include interest. The federal statute did not resolve the issue. Mr. Justice Frankfurter reasoned:

> "Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, . . . Congress has left us free to take into account appropriate considerations of 'public convenience.' . . . Nothing seems to us more appropriate than due regard for local institutions and local interests." *Id.* at 351.

In *Reconstruction Finance Corp.* v. *Beaver County,* 328 U.S. 204 (1946), the Court adopted the state law definition of real property because Congress, in enacting the federal taxation statute at issue there, did not define that concept.

Similarly, Congress has not defined "obscenity" here. Indeed, the substantive content of 18 U.S.C. § 1461 is exclusively determined by this Court's recent rulings in *United States* v. *12 200-ft. Reels of Film,* 413 U.S. 123 (1973), and *Hamling* v. *United States, supra.* Recognizing the chameleon quality of "obscenity," this Court has adopted the community's standards of "obscenity" for purposes of an 18 U.S.C. § 1461 prosecution. Resort to Iowa law is, therefore, proper.

5. Disregarding Chapter 725 of the Iowa Code Effectively Nullifies State Law in the Absence of Any Congressional Intent to Federalize "Obscenity."

In *Wheeler* v. *Barrera,* 417 U.S. 402 (1974), this Court rejected the facile argument adopted by the Court of Appeals below, that the "prosecution deals with a federal statute and state law has no bearing on its decision." (A. 46.) The Court, in *Barrera,* held that state law should control certain school funding issues under the Elementary and Secondary Education Act, stating:

> "By characterizing the problem as one involving 'federal' and not 'state' funds, and then concluding that federal law governs, the Court of Appeals, we feel, in effect nullified the Act's policy of accommodating state law." *Id.* at 419.

Here, the effect of the Court of Appeals' ruling was to nullify Chapter 725 of the Iowa Code. Yet *Schwartz* v. *Texas,* 344 U.S. 199, 202-03 (1952), instructed that "[t]he exercise of federal supremacy is not lightly to be presumed." That instruction is premised on the essential relationship between federal and state law that has been well-described in H. Hart & H. Wechsler, The Federal Courts and the Federal System 470-71 (2d ed. 1973):

> "Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."

See Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489 (1954).

This Court has ruled that federal law will not be deemed preemptive of state law absent a clear statement of Congressional intent or an inherently federal subject matter. As stated in *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963):

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the ab-

> sence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

This firm commitment to federalism has been reaffirmed in this Court's recent decisions. See, *e.g., National League of Cities* v. *Usery*, 96 S. Ct. 2465 (1976); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117 (1973); *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Goldstein* v. *California*, 412 U.S. 546 (1973). See also Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623 (1975).

Congress has been silent regarding any desire to federalize "obscenity." Indeed, Congress has never established a definition of "obscenity" or specified the governing "contemporary community standards" for measuring that concept despite repeated reenactments of 18 U.S.C. § 1461.[4] Rather, Congress has left the issue for determination by the Court.

6. This Court Has Rejected Any Need for National Uniformity in the "Obscenity" Area.

In the absence of any contrary Congressional expression, this Court has eschewed any need or desire for national uniformity in the "obscenity" area.

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [Cites omitted.] People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism

4. See Act of June 8, 1872, 17 Stat. 283, 302; Act of March 3, 1873, 17 Stat. 598, 599; Act of July 12, 1876, 19 Stat. 90; Act of Sept. 26, 1888, 25 Stat. 496; Act of May 27, 1908, 35 Stat. 416; Act of March 4, 1909, 35 Stat. 1088, 1129; Act of March 4, 1911, 36 Stat. 1327, 1339; Act of June 25, 1948, 62 Stat. 683, 768; Act of June 28, 1955, 69 Stat. 183; Act of Aug. 28, 1958, 72 Stat. 962; Act of Jan. 8, 1971, 84 Stat. 1973, 1974.

> of imposed uniformity." *Miller* v. *California, supra,* 413 U.S. at 32-33 (footnote omitted).

The genius of federalism is precisely the ability of each state individually to tailor a social environment for its citizenry. In fashioning the fabric of this environment, the state is free to experiment with differing philosophies toward "obscenity." As Mr. Justice Harlan stated:

> "It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. 'State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nationwide suppression of the book, and so long as other States are free to experiment with the same or bolder books." *Roth* v. *United States, supra,* 354 U.S. at 505-06 (Harlan, J., concurring and dissenting) (footnotes omitted).

Mr. Justice Stevens recently emphasized the need to permit communities to "experiment with solutions to admittedly serious problems," such as "obscenity" regulation. *Young* v. *American Mini Theatres, Inc.*, 96 S. Ct. 2440, 2453 (1976).

Congress has expressed no desire for federal supremacy over "obscenity"; this Court has rejected any need for national uniformity. The effective nullification of Iowa law by the Court of Appeals is, therefore, particularly unjustifiable. In *Goldstein* v. *California, supra,* the Court refused to hold that California's prohibition on record piracy was preempted by federal copyright law. The Court emphasized the traditional role of the states in promoting "those portions of science and the arts which were

of local importance," 412 U.S. at 557, and concluded that the limited national interests involved did not conflict with the divergent interests of citizens in different parts of the country. The Court stated:

> "No conflict will necessarily arise from a lack of uniform state regulation, nor will the interest of one State be significantly prejudiced by the actions of another." *Id.* at 560.

7. An Individual Should Receive Uniform Treatment in the State of His Residence.

Simple justice commands that an individual's daily conduct in the state in which he resides should be subject to a uniform body of laws. The same act should not be governed by two different standards—one state, one federal. This common sense reasoning was recently applied in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra.*

Ware concerned a claim of a forfeiture by the respondent of benefits in a noncontributory profit-sharing plan under the terms of an employment agreement. Petitioner Merrill Lynch argued that a New York Stock Exchange Rule, enacted pursuant to section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(f), directing arbitration of any controversy arising from employment terminations, preempted two California state statutes. The first California statute voided the employment agreement for including a noncompetition clause; the second required that arbitration clauses be disregarded in individual actions for the collection of wages. The Court refused to nullify the state laws, stressing California's "strong policy of protecting its wage earners." 414 U.S. at 139.

In reaching its decision, the Court recognized that "the individual's expectation of uniform treatment in the State of his residence" must not be "sacrifice[d]." *Id.* at 138; cf. *Erie Railroad* v. *Tompkins,* 304 U.S. 64 (1938) and its progeny. Otherwise, an individual is incapable of planning his daily affairs.

> "Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law'. . . ." *Klaxon Co.* v. *Stentor Electric Manufacturing Co.,* 313 U.S. 487, 496 (1941).

See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 194 (tent. ed. 1958).

Here, petitioner Jerry Lee Smith could legitimately expect that his distribution of materials to soliciting adults in Iowa was governed by Chapter 725 of the Iowa Code. Yet for this logical expectation Jerry Lee Smith is being imprisoned.

8. Any Potential Conflict Between Chapter 725 of the Iowa Code and 18 U.S.C. § 1461 Is Harmonized by the Adoption of the Iowa Legislature's Declaration of "Contemporary Community Standards."

In *Ware,* the Court, relying on the analytical framework in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), also emphasized the need to harmonize federal and state statutes.

> "Our analysis is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' [*Silver* v. *New York Stock Exchange, supra*] at 357." 414 U.S. at 127.

In analyzing the "tension," *Miller* v. *California, supra,* 413 U.S. at 29, between Chapter 725 of the Iowa Code and Jerry Lee Smith's 18 U.S.C. § 1461 prosecution, a federal court must adhere to the wisdom of *United States* v. *Bass,* 404 U.S. 336, 347-48 (1971):

> "First, as we have recently reaffirmed, 'ambiguity concerning the ambit of [federal] criminal statutes should be

resolved in favor of lenity.' . . . In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' . . . This principle is founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' . . . Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."

The Congressional decision not to define "obscenity," the lack of any need for national conformity, the predominate state interests at stake and Jerry Lee Smith's legitimate expectations that he would receive uniform treatment within his state of residence, all dictate that any potential conflict between Iowa's deregulation of the distribution of sexually related matter and a federal prosecution for a purely *intra*-Iowa mailing of allegedly "obscene" material is resolved by the adoption of Iowa law as the governing "contemporary community standards."

II.

18 U.S.C. § 1461 IS UNCONSTITUTIONALLY VAGUE AS APPLIED IN THIS CASE.

The ruling below—that federal jurors, in an 18 U.S.C. § 1461 prosecution, can disregard state law and themselves determine what community standards apply and what the dimensions of those standards are—not only offends our federalist

system, but also renders that statute unconstitutionally vague, and, therefore, void. Vague laws fail to provide the public with fair notice of what is prohibited; they affront due process. Such laws are subject to arbitrary enforcement and application, and necessarily infringe upon the exercise of protected rights. *Hynes* v. *Mayor & Council*, 96 S. Ct. 1755 (1976); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *United States* v. *Harriss*, 347 U.S. 612 (1954); *Winters* v. *New York*, 333 U.S. 507 (1948); see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). As stated in *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matter to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [Footnotes omitted.]

The line between protected speech and "obscenity" is "finely drawn," *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), indeed, "elusive," *Stanley* v. *Georgia*, 394 U.S. 557, 566 (1969). Consequently, "obscenity" statutes, like 18 U.S.C. § 1461, are strictly construed. See, *e.g.*, *Rabe* v. *Washington*, 405 U.S. 313 (1972) (per curiam); *Interstate Circuit, Inc.* v. *City of*

Dallas, 390 U.S. 676 (1968); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). As recently stated in *Hynes* v. *Mayor & Council, supra,* 96 S. Ct. at 1760:

> "The general test of vagueness applies with particular force in review of laws dealing with speech. '[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' *Smith* v. *California,* 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205, 210 (1959)."

Under the Court of Appeals' interpretation of 18 U.S.C. § 1461, the petitioner Jerry Lee Smith could not have foreseen that his conduct would lead to imprisonment. *Miller* and *Hamling* directed Jerry Lee Smith to measure "obscenity" by "contemporary community standards." Logically, Jerry Lee Smith must look to Iowa law to guide his conduct within Iowa. Yet the Court of Appeals ignored that logic in permitting the individual jurors to disregard their state's law in determining "obscenity."

If state law can be disregarded, how could Jerry Lee Smith determine the standards of the community? Expert testimony of the prevailing "contemporary community standards" need not be considered by the jurors, *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 56 n.6; hence, consultation with an expert would be of no value. A survey of community attitudes would be useless; it may be deemed inadmissible or disregarded by the jury. Cf. *Hamling* v. *United States, supra,* 418 U. S. at 108-10. Of course, Jerry Lee Smith's own belief in the "nonobscenity" of the materials is legally irrelevant; *Hamling* held that " 'knowledge of the character of the materials' " is a sufficient basis for a criminal conviction. *Id.* at 119-20.

Consequently, Jerry Lee Smith was subjected to prosecution and imprisonment under unascertainable standards. He could not know whether his distributions would result in a prison sentence until the jury rendered its verdict at his criminal trial.

Jerry Lee Smith was incarcerated for conduct wholly legal under state law. Such a result is the antithesis of due process.

Even appellate review of the jury's verdict is effectively precluded as the "contemporary community standards" applied can never be known. The Court of Appeals in this case held itself "bound by the jury decision." (A. 46.) Yet what standards were applied? What evidence is there in the record that Jerry Lee Smith distributed materials "obscene" under the prevailing "contemporary community standards" of the "average person" in Iowa? The Government offered no evidence of any standards. The subjective, totally discretionary views of twelve jurors stand alone against the "contemporary community standards" declared by their own legislature in Chapter 725 of the Iowa Code and the ready and lawful availability within their community of comparable materials.

Under the Court of Appeals' ruling, a prosecutor is not restrained by any standards. Therefore, 18 U.S.C. § 1461 is subject to arbitrary enforcement and application at the whim of the local prosecutor. *Hynes* v. *Mayor & Council, supra,* 96 S. Ct. at 1761. Thus, the statute is just as susceptible to abuse as the vagrancy law struck down in *Papachristou* v. *City of Jacksonville, supra,* or the political door-to-door canvassing and solicitation ordinance declared invalid for vagueness in *Hynes.*

Moreover, the Court of Appeals' interpretation necessarily chills the exercise of First Amendment rights. See, *e.g.,* Amici Curiae Brief of the American Library Association and the Iowa Library Association in Support of Petitioner. Thus, 18 U.S.C. § 1461, as interpreted by the Court of Appeals, manifests all the evils that the void for vagueness doctrine is designed to eradicate and, as a result, the statute must be declared invalid as applied to petitioner Jerry Lee Smith.

III.

THE DENIAL OF VOIR DIRE QUESTIONS ON "CONTEMPORARY COMMUNITY STANDARDS" DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

A. The Right to a Competent, Qualified and Impartial Jury Is Guaranteed by the Sixth Amendment and by Due Process of Law.

Petitioner submitted questions for the prospective jurors at *voir dire* to elicit their knowledge of "contemporary community standards" on what materials, taken as a whole, are "obscene" for adults in Iowa.[5] The Court of Appeals affirmed the District Court's refusal to permit these questions. Those rulings deprived Jerry Lee Smith of his Sixth Amendment and due process rights to trial by a competent, qualified and impartial jury. *Witherspoon* v. *Illinois,* 391 U.S. 510, 518 (1968); *Irvin* v. *Dowd,* 366 U.S. 717, 722-23 (1961); *Morford* v. *United States,* 339 U.S. 258 (1950) (per curiam); *Dennis* v. *United States,* 339 U.S. 162, 168 (1950); *United States* v. *Wood,* 299 U.S. 123, 133-34 (1936); see Note, *Exploring Racial Prejudice on Voir Dire: Constitutional Requirements and Policy Considerations,* 54 B.U.L. Rev. 394, 395-98 (1974).

This constitutional guarantee requires a thorough *voir dire.* Mr. Chief Justice Marshall, in *Mima Queen & Child* v. *Hepburn,* 11 U.S. (7 Cranch) 290 (1813), a suit to prove the petitioners' status as free persons, upheld the exclusion of a juror when the *voir dire* revealed his strong antislavery views. The Chief Justice stated:

> "[Jurors] ought to be superior to every exception, they out to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way . . . ." *Id.* at 297-98.

The landmark case of *Aldridge* v. *United States,* 283 U.S. 308 (1931), established the right at *voir dire* to inquire into the racial prejudice of prospective jurors. The Court in *Aldridge* reversed a murder conviction because the trial judge refused the *voir dire* questions propounded by the defendant. *Ham* v. *South Carolina,* 409 U.S. 524 (1973), reaffirmed *Aldridge,* finding that the right to appropriate *voir dire* inquiry derives from "the essential fairness required by the Due Process Clause." *Id.* at 527.

The scope of the *voir dire* in federal cases extends to areas beyond racial prejudice. Thus, in *Morford* v. *United States, supra,* 339 U.S. at 259, *Dennis* v. *United States, supra,* 339 U.S. at 168, and *Connors* v. *United States,* 158 U.S. 408, 413 (1895), this Court held that a defendant has the right to inquire into political prejudices. The Circuit Courts have reversed convictions for refusal to make *voir dire* inquires into prospective jurors' attitudes toward (1) the presumption of innocence, *United States* v. *Blount,* 479 F.2d 650 (6th Cir. 1973), (2) dissent, public protest, alternate life styles and confrontation with police, *United States* v. *Dellinger,* 472 F.2d 340, 366-70 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973), (3) purposeful lying and private investigators, *United States* v. *Napoleone,* 349 F.2d 350, 352-54 (3d Cir. 1965), and (4) bookmaking and illegal gambling, *Lurding* v. *United States,* 179 F.2d 419 (6th Cir. 1950).

5. These questions were as follows:

> "Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?
>
> "(The following individual questions are requested for each juror who answers the above question in the affirmative.)
>
> "Where did you acquire such information?
>
> "State what your understanding of those contemporary community standards are?
>
> "In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity?
>
> "State what your understanding of those laws are?" (A. 8.)

In *Brown* v. *United States*, 338 F.2d 543 (D.C. Cir. 1964), an opinion by Mr. Chief Justice Burger while a circuit judge, a conviction for assault with intent to commit robbery was overturned because the trial court had refused the defendant's request at *voir dire* to inquire whether any juror would " 'give greater credence to the testimony of a law enforcement officer merely because he is an officer as compared to any other witness.' "[6]

B. Petitioner's Voir Dire Questions Were Proper and Essential to Assure a Competent, Qualified and Impartial Jury.

The Court's adoption of the "contemporary community standards" test for "obscenity" requires the *voir dire* requested by petitioner. The "contemporary community standards" concept of *Miller* and *Hamling* is plainly an objective, legal test. *Hamling* v. *United States, supra*, 418 U.S. at 107. A juror is not to apply his own subjective reactions to the materials at issue; he must determine the nature of these materials from the viewpoint of "the average person" in his community. *Id.* at 104-05. Hence, as recognized in *Hamling*, it is essential that jurors have

6. Other cases in the Circuit Courts which endorse broad ranging *voir dire* include: *United States* v. *Robinson*, 475 F.2d 376, 390 (D.C. Cir. 1973) (endorsing inquiry into juror attitude toward self-defense); *Kuzniak* v. *Taylor Supply Co.*, 471 F.2d 702 (6th Cir. 1972) (per curiam) (reversing judgment for defendant in diversity suit for personal injuries because trial court refused to inquire into juror attitude toward aliens); *United States* v. *Lewin*, 467 F.2d 1132 (7th Cir. 1972) (reversing conviction for voter registration tampering because trial court refused to inquire into organizational relationships); *Stephan* v. *Martin Firearms Co.*, 353 F.2d 819 (2d Cir. 1965), *cert. denied*, 384 U.S. 959 (1966) (reversing judgment for defendants in diversity suit for personal injuries involving a rifle because trial court refused to inquire into juror expertise with firearms); *United States* v. *Puff*, 211 F.2d 171 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954) (endorsing inquiry into the intensity of views for or against capital punishment); *United States* v. *Daily*, 139 F.2d 7 (7th Cir. 1944) (endorsing inquiry into religious bias); *Bailey* v. *United States*, 53 F.2d 982 (5th Cir. 1931) (reversing a conviction for smuggling liquor because of restrictive *voir dire*).

the "qualifications and competency" to make the objective determination required of them. *Id.* at 140. This requires some knowledge of "contemporary community standards." Petitioner sought only to determine whether the prospective jurors had *any* such knowledge.

"Obscenity" is an emotional subject. Potential juror bias can run deep, yet be of a type that cursory examination will not uncover. Unless a thorough *voir dire* is allowed, a jury can be impaneled with latent prejudices that can result in the subversion of protected rights. As Professor Schauer pointed out:

> "In an obscenity case, more so than in most cases, the personal political, moral, religious, and sexual opinions of the jurors are likely to affect the verdict they render. . . . [I]n few other areas of the law are jurors likely to discover that acts personally abhorrrent and shocking to them are nonetheless legally protected. The defense should be given an opportunity to know of any such personal views in advance." F. Schauer, The Law of Obscenity, *supra* at 261.

The Court of Appeals, however, cast aside petitioner's *voir dire* requests, citing the tort law's "reasonable man" rule. That analysis is misguided. The "average person" in an "obscenity" case is quite different from the "reasonable man" in tort law. Although both terms are designed to convey an objective test, the latter conceptually directs the inquiry to the *best* human qualities of judgment, prudence and care. W. Prosser, The Law of Torts § 32, at 150 (4th ed. 1971). The "average person" test for "obscenity" directs the inquiry the opposite way—to the minimum degree of human *baseness* the community tolerates. As Professor Schauer aptly states:

> "If the sexual sophistication of the reasonable man were as finely tuned as his judgment and caution, then the major justification for obscenity laws would disappear, since this 'ideal' would not be aroused by *Ulysses* or *God's Little Acre*, and would be merely bored by commercial pornography. Thus, it must be recognized that the concept of the average man in obscenity law is most likely sui generis,

> and comparisons with the 'reasonable man' of tort law, the 'average prudent man' of trust law, or similar formulations are not likely to be helpful." F. Schauer, *supra* at 73.

Certainly, the "views of the average person in the community" are not on the jurors' "tongues," nor "on their sleeves." (A. 45.) Yet that truism only emphasizes the appropriateness of petitioner's *voir dire* questions. A person gains the competence to ascertain the characteristics of caution, prudence and care of a "reasonable man" merely by living in society. But that person does not—indeed cannot—"know" the views of the "average person" in the community toward "obscenity" unless and until he both dwells in that vicinage and is aware of the general attitudes toward and laws relating to depiction of sexually related matters currently prevailing there. Nothing in the trial judge's *voir dire* probed such competency questions; petitioner's proffered questions did.

The barring of *voir dire* inquiry into prospective juror's knowledge of "contemporary community standards" augments the intrinsic vagueness of the Court of Appeals' position. What remains to insure that jurors apply the objective test for "obscenity" compelled by the law? Expert testimony, the open availability of similar materials throughout the community, indeed, even state law, can be ignored by the jurors. Clearly, Jerry Lee Smith, deprived of effective *voir dire*, had no mechanism to safeguard his right to be tried, and have the evidence weighed, according to the community's standards, rather than the jurors' personal tastes.

No jury instruction can cure incompetency or bias. An instruction cannot "educate" a juror about the prevailing "contemporary community standards" in his vicinage. *Burton* v. *United States*, 391 U.S. 123 (1968), held that instructions not to consider the confession of one defendant which inculpated the codefendant were insufficient to preserve jury impartiality. *Bruton* recognized that there are limits to the mental gymnastics that can be expected of jurors.

"Obscenity" is often indistinguishable from protected speech. *Stanley* v. *Georgia*, *supra*, 394 U. S. at 566. With First Amendment rights and Jerry Lee Smith's personal freedom at stake, there can be no tolerance of jurors incapable of being "guided . . . by limiting instructions on the law [governing "obscenity"]." *Miller* v. *California*, *supra*, 413 U. S. at 30.

CONCLUSION.

For the reasons stated herein, petitioner Jerry Lee Smith's judgment of conviction must be reversed.

Respectfully submitted,

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Dated: September 14, 1976.

No. 75-1439

In the Supreme Court of the United States

OCTOBER TERM, 1976

JERRY LEE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (App. 44-46) is not yet reported. The order of the district court (App. 32-34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1976 (App. 46). On March 9, 1976, Mr. Justice Blackmun extended the time for filing

a petition for a writ of certiorari to and including April 12, 1976. The petition was filed on April 9, 1976, and was granted on June 21, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a federal prosecution for the mailing of obscene material wholly within a State, the fact that the State does not make criminal the distribution of such material to adults bars the jury from concluding that under contemporary community standards the material appealed to the prurient interest.

2. Whether the federal statute prohibiting the mailing of obscene matter (18 U.S.C. 1461) is unconstitutionally vague as applied in this case.

3. Whether prospective jurors should have been questioned on *voir dire* concerning their knowledge of contemporary community standards for determining whether allegedly obscene materials, taken as a whole, appeal to prurient interest.

STATUTE INVOLVED

18 U.S.C. 1461 provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly,

> where, or how, or from whom, or by what means any of such mentior d matters, articles, or things may be obtained or made * * *
>
> * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001 (e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of seven counts of mailing obscene material, in violation of 18 U.S.C. 1461. He was sentenced to concurrent terms of three years' imprisonment, with thirty months of that term suspended, and to concurrent three-year terms of probation on each count (App. 35). The court of appeals affirmed (App. 44-46).

The indictment charged, and the evidence established (App. 38-40), that between February and October 1974, petitioner knowingly mailed various issues of "Intrigue" magazine (GX. 4A, 10A, 6A, 7A, 8A), from Des Moines, Iowa, to addresses in Mount Ayr and Guthrie Center, Iowa (App. 3-4).[1] That magazine depicted nude males and females engaged in masturbation, fellatio, cunnilingus and intercourse (App. 6-7). In addition, on separate occasions in July 1974, petitioner mailed from Des Moines two films (GX. 12B, 14B) entitled "Lovelace" and "Terrorized Virgin" to Mount Ayr, Iowa (App. 5).[2] "Lovelace" depicted a nude male and a nude female engaged in masturbation and simulated acts of fellatio, cunnilingus and sexual intercourse (App. 5). "Ter-

[1] When the case was before the court of appeals, the transcript of the proceedings in the district court had not been prepared except for the portions relating to the selection of the jury and petitioner's motion for a judgment of acquittal. Our statement of the facts relies principally upon the agreed statement of the record on appeal filed in the court of appeals under Rule 10(d), Fed. R. App. P., which lists by number (identified at App. 13-16) the exhibits relating to the mailings. We are also lodging with the Court a copy of the trial transcript which has subsequently become available.

Petitioner conceded on appeal (App. 38-39) and concedes in this Court (Br. 6, 10, 33) that the materials were knowingly mailed by him and received by postal authorities.

[2] All materials involved here were the subject of test purchases by postal authorities in Mount Ayr and Guthrie Center, Iowa (Tr. 73, 78, 91). Mount Ayr, Guthrie Center and Des Moines are located in the Southern District of Iowa (Tr. 78, 93).

rorized Virgin" depicted two nude males and a nude female engaged in fellatio, cunnilingus and intercourse (App. 5-6).

Petitioner did not testify. In defense, he introduced numerous sexually explicit materials purchased at various so-called "adult book stores" in Des Moines and Davenport, Iowa, and several advertisements for a local newspaper, the *Des Moines Register and Tribune* (App. 40-41; Tr. 113-114, 118-126, 158-159). In addition, he placed in evidence chapter 725 of the Iowa Code, which at that time prohibited the dissemination or exhibition of "obscene material" only to minors (Tr. 131). See Section 725.2, 1975 Code of Iowa (App. 47-50).[3] He then moved for acquittal

[3] Following the Court's decision in *Miller* v. *California*, 413 U.S. 15, the Iowa Supreme Court held that a state statute (§ 725.3, 1973 Code of Iowa) prohibiting the presentation of an obscene drama, play, show or entertainment which would tend to corrupt the morals of youth or others, was unconstitutionally vague and overbroad. See *State* v. *Wedelstedt*, 213 N.W. 2d 652 (Iowa). Subsequently, the state legislature passed a new obscenity law—The Iowa Obscenity Act, ch. 1267, Act of the 65th G.A., 2nd Sess. This Act (ch. 725, 1975 Code of Iowa), effective on July 1, 1974, proscribed the dissemination of "obscene material" to minors but not to adults. (The materials in counts one through three were mailed prior to the effective date of that Act.)

Iowa has recently amended its obscenity statute The state legislature passed the final version of the new statute on May 28, 1976; the Governor signed the bill on June 28, 1976, to be effective January 1, 1978. The new statute prohibits the distribution to anyone, including consenting adults, of "material depicting a sex act involving sadomasochistic abuse, excretory functions, a child, or bestiality." Iowa Senate File 85, Section 2804.

on the ground, *inter alia*, that the Iowa obscenity statute proscribing the dissemination of obscene materials only to minors set forth the applicable community standard, and that the government had failed to show that the allegedly obscene material offended that standard (Tr. 132-135). The district court denied the motion (Tr. 135).

Following his conviction, petitioner moved for a new trial, again asserting that the state criminal laws defined community standards (App. 32). In denying this motion, the district court stated that the federal statute (18 U.S.C. 1461) "neither incorporates nor depends upon the laws of the states" (App. 33). It reasoned that "[r]egardless of the state laws, federal proscriptions still remain upon the mailing of obscene materials" because the community standard is not determined "by what a state legislature has elected to tolerate" (App. 33). The court concluded that whether certain nonregulated conduct is approved by the citizens of that state "is a question of fact to be resolved by the jury" (App. 33).

The court of appeals affirmed. It relied upon the statement in *Hamling* v. *United States*, 418 U.S. 87, 104, that each juror in arriving at his view of the contemporary community standard was "entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes * * * " (App. 46).

The court stated (App. 46):

> [W]e note that the trial court admitted into evidence a copy of Iowa's obscenity statute. This

> was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do.

SUMMARY OF ARGUMENT

Miller v. *California*, 413 U.S. 15, redefined constitutional guidelines for finding, as a fact under state and federal law, whether materials are obscene. *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 129-130. The contemporary community standards element of *Miller's* three-part test refers to a factual determination as to whether that material appeals to a prurient interest in sex. Iowa's legislative determination not to make criminal the distribution of obscene material to adults expresses the state's public policy that even distribution of material that is obscene under *Miller* should not be grounds for prosecution under state law. The Iowa statute does not declare by legislative fiat that in Iowa the kind of hard core pornography involved here does not in fact appeal to the prurient interest. Nor does it purport to regulate the mails. Whether interstate or intrastate, the mails are exclusively a federal sphere of responsibility, subject to control only by Congress. Congress has closed the mails to hard core pornography without reference to state law, and in a series

of cases culminating in *Hamling* v. *United States*, 418 U.S. 87, this Court has held that it may constitutionally do so. The jury in this case was permitted to determine for itself the extent to which the Iowa statute reflected contemporary community standards. The jurors were not free to apply subjective notions about obscenity since they were carefully instructed under the objective "average person/community standards" test of *Miller*, *12 200-Ft. Reels*, and *Hamling*.

Because federal law, rather than the Iowa Code governs the mails, and 18 U.S.C. 1461 has been construed to be limited to hard core pornography (*Hamling*, *supra*), the statute adequately informed petitioner that he was subject to federal prosecution if he mailed such material anywhere.

Finally, the district court properly refused to permit *voir dire* questioning of prospective jurors as to their knowledge of community standards. The capacity of jurors to apply the *Miller* standards without special inquiry into their personal knowledge of contemporary standards in their community was recognized in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 and *Hamling*, 418 U.S. at 104-105.

ARGUMENT

I. A JURY IN A FEDERAL PROSECUTION FOR MAILING OBSCENE MATERIAL MAY DETERMINE THAT UNDER CONTEMPORARY COMMUNITY STANDARDS THE MATERIAL APPEALS TO THE PRURIENT INTEREST, EVEN THOUGH THE STATE IN WHICH THE MAILS WERE USED AND THE TRIAL TOOK PLACE DOES NOT MAKE CRIMINAL THE LOCAL DISTRIBUTION OF OBSCENE MATERIAL TO ADULTS.

In *Miller* v. *California*, 413 U.S. 15, this Court redefined the constitutional standards under the First and Fourteenth Amendments governing State criminal statutes punishing distribution of obscene materials. In *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 129-130, this Court held that the same standard applies in federal obscenity prosecutions, and in *Hamling* v. *United States*, 418 U.S. 87, it was held applicable to the mailing of hard core pornography.

In *Miller*, the Court held (413 U.S. at 24):

> [t]he basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin*, *supra*, at 230, quoting *Roth* v. *United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Iowa presently makes criminal the distribution of obscene material only to minors but not to adults.[4] Petitioner argues that since his distribution of obscene material in Iowa would not be a crime under the law of that State, the jury in this federal obscenity prosecution there could not properly determine that the material appealed to prurient interest under "contemporary community standards." The argument is that the contemporary community standards in Iowa regarding appeal to prurient interest are fixed by the State's legislative determination not to make the local distribution of obscene material a crime.

The fact that the State does not punish the distribution of obscene material to adults does not mean that under contemporary community standards such material cannot appeal to prurient interest. The legislative action of the State does not purport to be a determination on the latter issue; indeed, the State

[4] As noted (*supra*, p. 5, n. 3), Iowa recently amended its obscenity statute to make criminal the distribution of certain types of obscene material to everyone.

In addition to Iowa, at least six other states do not make generally criminal the distribution of obscene material to consenting adults. Colorado (Colo. Rev. Stat. Ann. 18-7-101 to 18-7-106; 18-7-401 and 402; 31-15-401 (1976) (adult exemption does not apply to "sadomasochistic" materials, 18-7-104); Montana (Rev. Codes of Mont. Ann. 94-8-110 (Spec. Crim. Code Supp. 1976) (exemption inapplicable to "pandering"); New Mexico (N.M. Stat. Ann. §§ 40-45-1 to 40-50-8 (Supp. 1975)); South Dakota (S.D. Comp. Laws Ann. 22-24-36 (Supp. 1976)); Vermont (13 V.S.A. §§ 2801-2807 (Supp. 1974)); West Virginia (W. Va. Code Ann. 61-8A-1 to 61-8A-7 (Cum. Supp. 1976)).

by legislative fiat could not determine that material that in fact appeals to prurient interest does not do so. The only determination the State of Iowa has made is that for policy reasons it will not prosecute the distribution of obscene material to adults. In other words, Iowa has concluded that even though particular material may appeal to prurient interest, as a matter of State policy it will not make criminal the distribution of the material to adults.

Petitioner argues that in the Iowa obscenity statute "the state legislature has declared that nothing could be 'obscene' under the prevailing 'contemporary community standards' " (Br. 23) and, therefore, that "the *governing law* made nothing 'obscene' for consenting adults in Iowa * * *" (Br. 22; emphasis added). The issue, however, is not whether Iowa has made nothing obscene for consenting adults there, but whether the Iowa statute precludes a jury in a federal prosecution in Iowa for distributing obscene materials intrastate through the mails from concluding that under contemporary community standards the material appeals to the prurient interest.

The Iowa statute does not purport to define the community standard for determining whether material appeals to the prurient interest. It does not declare or even imply that in Iowa hard-core pornography (such as is here involved) should not be deemed to appeal to that interest; it had merely made the local distribution of such material to adults non-criminal under state law. The Iowa obscenity statute does not attempt to regulate or establish

standards for the intrastate uses of the mails in Iowa to transport obscene material, and it could not do so.

The application of the federal mail statutes does not depend upon or incorporate state law touching on the same subject. The constitutional power of Congress over the mails (Art. I, Section 8, cl. 7) is "exclusive" (*Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 n. 18, quoting S. Doc. 118, 24th Cong., 1st Sess. 3) and "embraces * * * the entire postal system" (*Ex parte Jackson*, 96 U.S. 727, 732), subject only to other constitutional requirements. See, *e.g.*, *Blount* v. *Rizzi*, 400 U.S. 410 (administrative censorship); *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (mailing lists); *Lamont* v. *Postmaster General*, 381 U.S. 301 (communist political propaganda); *Marcus* v. *Search Warrant*, 367 U.S. 717 (seizure of allegedly obscene material). Under the postal power Congress may refuse "to include in its mails such printed matter or merchandise as may seem objectionable to it upon the grounds of public policy * * *." *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507; *In re Rapier*, 143 U.S. 110; *Ex parte Jackson*, *supra*. Because the postal power is separate from the power to regulate interstate commerce (Art. I, Section 8, cl. 3), federal mail statutes apply equally to interstate or intrastate uses of the mails.

A state cannot impose a "direct, physical interference" on the valid exercise of the postal power, nor can its law cause "some direct, immediate burden on the performance of the postal functions." *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88, 96. The

postal power includes the authority to prohibit uses of the mails, whether or not the states prohibit the underlying activity. See, *e.g.*, *Parr* v. *United States*, 363 U.S. 370, 389; *United States* v. *States*, 488 F.2d 761, 767 (C.A. 8). Whenever Congress exercises its power over any federally-regulated facility, including the mails, it is irrelevant that the state within which that facility is located does not also proscribe that activity.

For more than 100 years, since the Comstock Act of 1872 (Act of 1872, ch. 335, Section 148, 17 Stat. 302, as amended, Act of March 3, 1873, ch. 258, Section 2, 17 Stat. 599), Congress has prohibited the mailing of obscene matter.[5] The constitutionality of that Act was upheld in *Ex parte Jackson*, *supra*. The present statute (18 U.S.C. 1461), like its predecessors, broadly prohibits the distribution of any obscene material through the mails without regard to whether the mailing is inter- or intrastate, whether the recipient has sought the material or objects to it, or whether the state in which the mailings are made or received itself prohibits the distribution of obscene materials. See, generally, *United States* v.

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[5] The Tariff Act of 1842, ch. 270, Section 28, 5 Stat. 566, contained the earliest congressional prohibition of obscene materials. Section 28 of that Act proscribed the "importation of all indecent and obscene prints, paintings, lithographs, engravings, and transparencies." The congressional power to prohibit the importation of "indecent prints" was recognized in *Thurlow* v. *Massachusetts*, 5 How. 609, 628. The constitutionality of its progeny, 19 U.S.C. 1305(a), was upheld in *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123.

Reidel, 402 U.S. 351; *Roth* v. *United States*, 354 U.S. 476. See also Cairns, Paul and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009, 1010 n. 2 (1962), for a historical sketch of federal obscenity law.

When Congress has intended to make the applicability of a federal criminal law turn upon state law, it has expressly so provided. For example, 18 U.S.C. 1955 makes illegal certain activities related to an "illegal gambling business," which is defined as a gambling business that, among other things, "is a violation of the law of a State or political subdivision in which it is conducted" (18 U.S.C. 1955(b)(1)(i)). Similarly, the anti-racketeering statutes define "racketeering activity" to include "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year" (18 U.S.C. 1961(1)). The Travel Act makes illegal interstate travel in furtherance of "any unlawful activity," which it defines to include prostitution offenses, extortion, bribery, or arson "in violation of the laws of the State in which committed" (18 U.S.C. 1952(a), (b)). The transportation or sale in interstate or foreign commerce of "any wildlife taken, transported or sold in any manner in violation of any law or regulation of any State" is prohibited under 18 U.S.C. 43(a)(2).

The federal statute making criminal the transmission of wagering information in interstate or foreign commerce has an exception for "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal" (18 U.S.C. 1084(b)). Finally, the Assimilative Crimes Act (18 U.S.C. 13) provides that any person guilty of any act or omission within areas of federal jurisdiction that has not been made criminal by federal law but that "would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

As these statutes show, when Congress intended to make the applicability of federal law depend upon state law, it has clearly and explicitly said so. It has not done so, however, in the federal statutes prohibiting the mailing of obscene materials. Instead, it has provided a federal standard that makes no reference to state law.[6] If the distribution of

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[6] Petitioner argues (Br. 32-33) that this Court should hold that state obscenity laws govern in federal obscenity prosecutions, as it ruled with respect to state law in diversity cases in *Erie Railroad Co.* v. *Thompkins*, 304 U.S. 64. *Erie* held that the earlier decision in *Swift* v. *Tyson*, 16 Pet. 1, which *Erie* overruled, had erroneously interpreted the Federal Judiciary Act of 1789 as authorizing the federal courts themselves to determine the rules of the common law. That statute,

obscene material through the mails meets the three-part test of obscenity set forth in *Miller*, it violates federal law, and it is irrelevant to that determination whether or not the state also punishes the conduct.[7]

In dealing with the mailing of obscene materials, Congress followed the same policy it adopted in legislation prohibiting the use of federally-regulated facilities to promote lotteries, without regard to whether the lotteries are illegal under the laws of the states involved. See, *e.g.*, 18 U.S.C. 1302 (use of the mails); 18 U.S.C. 1304 (use of radio or televi-

now contained in 28 U.S.C. 1652, provided that, except where the Constitution, treaties or statutes provided otherwise, the "laws of the several States * * * shall be regarded as rules of decision in trials at common law" (304 U.S. at 71). The court held in *Erie* that "in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States" (304 U.S. at 80). The present case is quite different, since it involves a federal substantive statute which, as shown, constitutionally establishes federal criminal standards that do not depend upon or adopt state law.

[7] The second element of the obscenity test announced for the states in *Miller* is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" (413 U.S. at 24). That element, however, does not require reference to state law to determine obscenity *vel non* in a federal prosecution. In *Hamling* v. *United States*, *supra*, 418 U.S. at 114, the Court held that under 18 U.S.C. 1461 (the provision here involved), this element of the *Miller* test is met if the material constitutes "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*." Whether the material meets that standard is a question of federal law, the answer to which is not dependent upon state law.

sion); 18 U.S.C. 1306 (federally insured financial institutions prohibited from selling lottery tickets). In enacting these statutes, Congress expressed a "national policy to refrain from using Federal facilities in the promotion and advertisement of lotteries * * *." S. Rep. No. 727, 90th Cong., 1st Sess. 3 (1967). This Court has held that lottery-related materials can be excluded from the mails or other federal facilities, notwithstanding the lawfulness of the lottery under state law. See, *e.g.*, *In re Rapier*, 143 U.S. 110 (Louisiana lottery); see, also, *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990, 996 (C.A. 2), certiorari denied, 396 U.S. 1061 (18 U.S.C. 1304); *Boasberg* v. *United States*, 60 F.2d 185 (C.A. 5), certiorari denied, 287 U.S. 664; *United States* v. *Noelke*, 1 Fed. 426, 440 (C.C. S.D.N.Y.); *United States* v. *Politzer*, 59 Fed. 273, 275 (N.D. Cal.); see 15 Ops. Atty. Gen. 203 (1877).[8]

The purpose of the community standards element of the obscenity test "is to be certain that * * * material * * * will be judged by its impact on an average person, rather than on a particularly susceptible or sensitive person—or indeed a totally insensitive one" (*Miller* v. *California*, *supra*, 413 U.S. at 33). It is designed "to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community

[8] Congress has recently exempted state lotteries from certain restrictions (see 18 U.S.C. (Supp. V) 1307).

standards' would reach in a given case" (*Hamling* v. *United States*, *supra*, 418 U.S. at 105). The district court's instructions in this case amplifying the community standards factor properly explained the jury's role in deciding whether the materials are obscene. It informed the jury that it was to apply objective standards reflecting the views of the community rather than the personal subjective views of individual jurors.[9]

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[9] The court's instruction No. 9 (A. 22-23) stated:

> The phrase "average person, applying contemporary community standards" as used in test (a) in the preceding instruction requires some explanation. The community with which we are concerned is coextensive with the jurisdiction of this Court, roughly that part of the State of Iowa lying south of U.S. Highway 30.
>
> Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say, by society at large or people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. In determining the view of average persons of that community, you are each entitled to draw on your own knowledge of the views of the average person in the community from which you come as well as consider the evidence presented as to the state law on obscenity and materials available for purchase in certain stores as shown by the evidence.
>
> What may appear to some people to be in bad taste or offensive may appear to be amusing or entertaining to others. Obscenity is not a matter of individual taste. The personal opinion of a juror as to the material in question here is not the proper basis for a determination whether or not the material is obscene. As stated above the test is how the average person of the community as a whole would view the material.

To whatever extent the Iowa obscenity laws recognize and reflect the contemporary community standards, the jury in this case was permitted to take those laws into account. The jury was instructed that "[i]n determining the view of average persons of that community," it could "consider the evidence presented as to the state law on obscenity" as well as that regarding "materials available for purchase in certain stores as shown by the evidence" (A. 22-23). As the court of appeals held (A. 46): "The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do."

The determination by the jury that the materials in this case are obscene does not interfere with or impinge upon the proper sphere of the State's regulatory power. The State, of course, has the power to regulate the intrastate distribution of obscene materials and to make criminal only distribution to minors but not to adults. The language from *Miller* upon which petitioner relies (Br. 24-25) recognizes that authority against the claim that the federal power over interstate commerce and the mails preempted the field and barred state regulation of intrastate distribution of obscene materials. See, also, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-58.

But the existence of that power in the State of Iowa does not bar the application of the federal obscenity statute to mailings of obscene matter within the State. Federal and State power over this area are separate. The State's legislative decision not to

make criminal the local distribution of obscene material to adults does not convert that material into constitutionally protected speech, and it is not inconsistent with and does not preclude a federal prosecution for distributing those materials in Iowa through the mails. The conviction of petitioner for distributing this hard core material within Iowa through the mails does not violate or impede any state policy or standard governing matters within the proper sphere of state regulation.

The determination whether distribution of material is obscene under *Miller's* three-part test should be made criminal at all involves a matter of legislative policy. That determination must be made by the Congress or state legislatures within their respective spheres of constitutional responsibility. In contrast, "whether the average person applying contemporary community standards would find that the work, taken as a whole appeals to the prurient interest," is an objectively defined standard for a specific factual inquiry that is constitutionally required before a trier of fact may find material obscene (*Miller, supra*, 413 U.S. at 33; *Hamling, supra*, 418 U.S. at 107).

Petitioner's basic argument misconstrues *Miller* by confusing the factual inquiry with the policy question. Even in states that do not make the distribution of obscenity a crime, contemporary community standards may recognize, as a fact, that hard core pornography appeals to a prurient interest in sex. Nothing in *Miller* suggests that a state's legislative

decision not to make distribution of obscenity a crime changes the nature of such material or the community's recognition of its prurient appeal. Consequently, nothing in *Miller*, as a constitutional matter, bars a federal jury in such a state, in a prosecution under a valid federal obscenity law, from finding as a fact that such material has a prurient appeal.

II. THE FEDERAL STATUTE PROHIBITING THE MAILING OF OBSCENE MATTER INVOLVED IN THIS CASE (18 U.S.C. 1461) IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED

Petitioner's contention (Br. 7) that 18 U.S.C. 1461 is unconstitutionally vague as applied in this case is but another formulation of his major point that the lack of an Iowa statute prohibiting the distribution of obscene material to adults barred the jury from determining that under contemporary community standards the material appealed to prurient interest. The argument is that since his distribution of obscene matter was not a crime under Iowa law, the federal statute did not put him on notice that the distribution might nevertheless violate federal law under the community interest standard.

We have shown in point I, *supra*, that the federal statute properly may be applied to convict petitioner even though Iowa has not made the local distribution of obscene materials to adults a crime. The statute informed petitioner that, if he distributed obscene material through the mails, he would violate it. This Court held in *Hamling* v. *United States*, *supra*, 418

U.S. at 114, that the statute is limited to the hard core pornography described in *Miller* v. *California*, *supra*, and "[a]s so construed, we do not believe that petitioners' attack on the statute as unconstitutionally vague can be sustained." Petitioner makes no claim that the materials he distributed are not the kind of hard core pornography to which the statute may constitutionally be applied. As applied to petitioner, 18 U.S.C. 1461 is not unconstitutionally vague.

III. THE DISTRICT COURT PROPERLY REFUSED TO ASK THE PROSPECTIVE JURORS ON *VOIR DIRE* ABOUT THEIR KNOWLEDGE OF CONTEMPORARY COMMUNITY STANDARDS OF OBSCENITY

Petitioner requested the district court to ask the prospective jurors on *voir dire* whether they had knowledge of the contemporary community standards of obscenity, where that knowledge was acquired, what the standards were, whether they had considered the Iowa obscenity statute in reaching their understanding of the community standard and what that statute meant to them.[10] Petitioner also requested the trial court to ask the prospective jurors whether they were members of or in sympathy with any organization that promotes the regulation or banning of allegedly obscene materials.

The court asked the latter question (Tr. 18, 27-28),[11] but refused to ask the former questions relating to the jurors' understanding of a contemporary community standard. The court later stated that those questions were "no more required than would pretrial disclosure of a juror's concept of 'reasonableness' be necessary where that standard is an essential element" (App. 34), and concluded that its instructions on the contemporary community standard and the means by which the jurors were to determine that standard would be sufficient to insure a fair and unbiased jury without initial inquiry into the jurors' views on the subject.

The court of appeals upheld the district court's refusal to probe the jurors' knowledge of contemporary community standards, because those questions did not relate to "the qualifications to serve as a juror, bias" or any other relevant inquiry (App. 46). The court reasoned that a juror's understanding of the contemporary community standard is "inborn and often

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[10] The questions petitioner proposed were (App. 8):

(2) Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

(3) Where did you acquire such information?

(4) State what your understanding of those contemporary community standards are?

[Footnote continued on page 23]

[10] [Continued]

(5) In arriving at this understanding did you take into consideration the laws of the State of Iowa which regulate obscenity?

(6) State what your understanding of those laws are?

[11] One prospective juror who had signed a petition against pornographic materials was dismissed (Tr. 18-19).

undefinable" and cannot readily be expressed in words (App. 45).

These rulings were correct. The purpose of *voir dire* is to protect a defendant's right to trial by a competent, qualified and impartial jury (see, *e.g.*, *Ristaino* v. *Ross*, 424 U.S. 589; *Ham* v. *South Carolina*, 409 U.S. 524; *Aldridge* v. *United States*, 283 U.S. 308); "to test the qualifications and competency of the prospective jurors." *Hamling* v. *United States*, *supra*, 418 U.S. at 140. However, the " 'determination of impartiality is particularly within the province of the trial judge' " (*Ristaino* v. *Ross*, *supra*, 424 U.S. at 595, quoting *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (Clark, J., dissenting)), who has "broad discretion as to the questions to be asked" (*Aldridge* v. *United States*, *supra*, 283 U.S. at 310) on *voir dire*.

The questions petitioner proposed were not related to the "qualifications and competency of the prospective jurors." *Hamling* v. *United States supra*, 418 U.S. at 140. On the contrary, they related to the jurors' understanding of the contemporary community standard and the Iowa obscenity law. The questions related to legal issues, of which the prospective jurors' knowledge is irrelevant to their qualifications to serve.[12] It is the court's function to in-

[12] See, *e.g.*, *United States* v. *Wooton*, 518 F.2d 943 (C.A. 3) (reasonable doubt); *United States* v. *Nance*, 502 F.2d 615, 620 (C.A. 8), certiorari denied, 420 U.S. 926 (*inter alia*, indictment as evidence of guilt); *United States* v. *Delay*, 500 F.2d 1360, 1366 (C.A. 8); *United States* v. *Crawford*, 444 F.2d 1404, 1405 (C.A. 10) (entrapment), certiorari denied,

struct the jury on the law; each juror need only express a willingness to follow that instruction. As noted above, the district court correctly instructed the jury regarding the ascertainment of community standards and the possible significance of the Iowa statute.

Petitioner contends (Br. 42), however, that a juror will not necessarily be able to determine the community's standards merely because he lives there, and that the jurors therefore should have been examined to determine whether they were "aware of the general attitudes toward and laws relating to depiction of sexually related matters currently prevailing there." This Court, however, has rejected such a limited view of the jury's capacities and capabilities; it has ruled that a jury is able to determine the obscenity *vel non* of material, which necessarily involves ascertaining and applying community standards, without the assistance of expert testimony. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56; *Kaplan* v. *California*, 413 U.S. 115, 121; *Ginzburg* v. *United States*, 383 U.S. 463, 465. Although expert testimony is usually necessary to explain to the jury that which "they otherwise could not understand," "[n]o such assistance is needed by jurors in obscenity cases." *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 56 n. 6."[13]

404 U.S. 855; *Grandsinger* v. *United States*, 332 F.2d 80 (C.A. 10) (reasonable doubt). *Contra*, *United States* v. *Blount*, 479 F.2d 650 (C.A. 6) (reasonable doubt).

[13] The Court has left open the possibility of using expert witnesses in "the extreme case, not presented here, where

To the extent that petitioner's proposed questions were designed to uncover bias or prejudice among prospective jurors, the court's other questions adequately probed those issues. At the outset, the court directed a general question to the panel (Tr. 5-6):

> As indicated in the reading of the indictment, this is a case that involves allegedly obscene materials, which will involve exhibits which may show various sexual acts by men and women in various positions, both deviate and normal sex acts. I'm going to ask the entire jury panel, because of the nature of the particular case, are there any of you that would have a prejudice or a feeling in advance, or would be uncomfortable sitting in a trial of a case of this nature?

Later, as petitioner requested,[14] the court asked (Tr. 18):

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contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 56, n. 6.

[14] Petitioner requested the court to ask (App. 8):

> Are any members of the panel a member of or are in sympathy with any organization which has for its purpose the regulating or banning of alleged obscene materials?

The court's question additionally inquired about contributions to and past expressions of sympathy with anti-pornographic organizations. Thus, the court probed somewhat more deeply into potential prejudice or bias than petitioner requested.

> Are any of you members, or have any of you made contributions to, or have you expressed, or are you in sympathy with any organization that has for its purpose the regulation or banning of alleged obscene materials? Can any of you answer that question in the affirmative? Member of any organization, or made any contribution to, or are in sympathy with an organization which concerns itself with the banning of obscene materials? [15]

The court's inquiry "was clearly sufficient to test the qualifications and competency of the prospective jurors." *Hamling* v. *United States*, *supra*, 418 U.S. at 140.[16]

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[15] As noted (*supra*, p. 23, n. 11) one prospective juror was dismissed as a result of this questioning.

[16] The American Library Association, *et al.*, as amicus curiae, argues that 18 U.S.C. 1461 is unconstitutional because it permits criminal sanctions for the mailing of obscenity without a prior civil proceeding. This contention is beyond the scope of the issues raised in the petition. As to amicus Association of American Publishers, Inc., *et al.*, we believe that its contentions are fully answered by the arguments set forth above.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1976.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 222544 4

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LIST OF AUTHORITIES CITED.

Cases.

Miscellaneous.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1439.

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

Petitioner Jerry Lee Smith submits this Reply Brief in response to the Brief for the United States. The Government advocates the misguided notions that fostered the anomalous result below, where petitioner Jerry Lee Smith was sentenced to federal prison for conduct lawful in the state in which it occurred. The defects of the rulings below are addressed in the Brief for Petitioner. The fallacies in the Government's brief are detailed herein.

Section I(A) of this Reply Brief exposes the Government's failure to consider principles of American federalism in asserting that Congress' "exclusive" authority over the United States mails absolutely precludes adoption of Iowa law as the measure of "obscenity" in a criminal prosecution under 18 U.S.C. § 1461 for *intra*-Iowa mailings. These federalist principles underlie the

Court's determination in *Miller* v. *California*, 413 U.S. 15 (1973), and its progeny, that "obscenity" is measured by "contemporary community standards." The pre-eminence of local concerns and the absence of a need, or Congressionally expressed desire, for national uniformity inspired this approach. Section I(B) details the Government's misreading of the *Miller* decisions in its attempt to avoid the clear fact that Iowa law establishes the "contemporary community standards" governing this case.

Section II demonstrates that the interpretation of 18 U.S.C. § 1461 and the *Miller* line of cases urged by the Government would render that statute unconstitutionally vague as applied to the situation at bar, for here the "community" legislatively decided to permit the distribution of sexually related materials among its citizenry. Finally, Section III relates the essential need at *voir dire* to probe the capacity of potential jurors to apply the "contemporary community standards" test, particularly if jurors are, as the Government argues, free to disagree with their legislature's determination of what is offensive to those standards.

I.

FUNDAMENTAL PRINCIPLES OF FEDERALISM AND THIS COURT'S MILLER LINE OF CASES MANDATE THE ADOPTION OF IOWA LAW AS THE MEASURE OF "OBSCENITY" FOR JERRY LEE SMITH'S 18 U.S.C. § 1461 PROSECUTION FOR INTRA-IOWA MAILINGS.

A. In the Absence of a Congressional Intent to Federalize "Obscenity," Adoption of State Law as the Standard of "Obscenity" Is Appropriate.

The Government argues that Congress' "exclusive" power over the United States mails controls whether Iowa law should be adopted as the governing standard of "obscenity" for Jerry Lee Smith's prosecution under 18 U.S.C. § 1461. (Br. 7, 12-13.) The Government misapprehends the issue presented. Petitioner neither disputes Congress' power over the mails, nor

asserts that Iowa law governs of its own force.[1] Rather petitioner submits that under the doctrine of co-operative federalism, endorsed and applied by this Court, 18 U.S.C. § 1461 should be interpreted as incorporating Iowa law as the measure of "obscenity" in the circumstances of this case.

Recognizing the inevitable incompleteness of much Congressional legislation and the interstitial nature of federal law in our federalist system, this Court has rejected the facile argument that, in interpreting Congressional enactments, federal courts must apply a federal standard without regard to applicable state law. The Court has selected state law as the rule of decision where Congress has not specifically considered the situation presented, and the issues involved are of local importance, or where failure to adopt state law would have adverse consequences. See, *e.g.*, *Wheeler* v. *Barrera*, 417 U.S. 402 (1974); *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946); *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939), all discussed in petitioner's main brief at 23-30[2];

1. The Government's citations to establish this federal power (Br. 12-13) are thus beside the point. Cf. *Roth* v. *United States*, 354 U.S. 476, 504 n.5 (1957) (Harlan, J., dissenting). None of the cases cited by the Government involved "obscenity" except, ironically, the authorities constitutionally limiting the exercise of the postal powers. Moreover, in *Parr* v. *United States*, 363 U.S. 370 (1960), which reversed mail fraud convictions, the Court stated:

> "it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by *state law* are criminal under the Federal mail fraud statute . . . ." *Id.* at 391 (emphasis added).

Hence, as more fully detailed herein, state law is not, as the Government argues (Br. 16), irrelevant to how Congress has exercised the postal powers.

2. The Government's brief ignores this body of law while mischaracterizing petitioner's argument as premised on the notion that *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938) compels resort to Iowa law. (Br. 15 n.6.) The significance of *Erie* is its recognition of the importance of state law in the operation of our federalist system. The *Erie* principles support the selection by federal courts

(Continued on next page)

cf. *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 591-96 (1973). See also Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 799 (1957); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 533 (1954); Note, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. Chi. L. Rev. 823 (1976). As Professor Mishkin observed:

> "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation." Mishkin, *supra* at 800 (footnote omitted).

Jerry Lee Smith's conviction for conduct lawful in the state in which it occurred presents the archetypical case for the exercise of this judicial power. The federal statute under which he was sentenced to prison, 18 U.S.C. § 1461, contains no statement of purpose; it simply prohibits the mailing of any "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." The statute was enacted in 1873 with less than an hour of Congressional debate. Although repeatedly re-enacted,[3] it has never been extensively debated or substantially revised. Hence, the statute on its face does not reflect any intent to proscribe the mailing of sexually related matter without regard to state law.

(Continued from preceding page)
of state law in order to flesh out the details of Congressional programs in circumstances such as those present in this case. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 798-99 (1957).

3. See Br. for Petitioner at 30.

The lack of any such Congressional intent is further confirmed in that, despite this Court's ongoing development of the constitutional parameters of "obscenity," Congress has never even provided a definition of what is prohibited by 18 U.S.C. § 1461.[4] Congress has instead left that matter, with its critical First Amendment implications, for determination by this Court.

The Court, in the *Miller* line of cases,[5] has declared that the "intractable obscenity problem"[6] is predominantly a matter of local concern for which there is no need for national uniformity. The Court, therefore, has rejected any mandatory application of a "national standard" for what is "obscene," and adopted an approach based on the local "contemporary community standards." The Court has recognized the right of state legislatures to determine those standards. Indeed, the Court has specifically permitted the option of removing all restraints on the distribution of sexually related material. Moreover, the Court has expressly declared that the "contemporary community standards" test applies in federal "obscenity" prosecutions. (Br. of Petitioner 13-34.) The federalist precepts underlying the *Miller* rulings mandate the adoption of Iowa law as the measure of "obscenity" for Jerry Lee Smith's *intra*-Iowa mailings.

Such a result offends no federal interest: the Government advances no federal interest for prohibiting the mailing of sex-

4. The lottery cases relied on by the Government (Br. 16-17) therefore provide no analogy for the "obscenity" issues at bar. The anti-lottery statute defines what is prohibited— "[a] scheme offering prizes dependent in whole or in part upon lot or chance." 18 U.S.C. § 1302. Moreover, lottery regulation only tangentially involves First Amendment questions. *Ex parte Jackson*, 96 U.S. 727, 733-36 (1877). In contrast, the elusive concept of "obscenity" directly encroaches upon the exercise of sensitive First Amendment rights. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963).

5. *Miller* v. *California, supra; Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973); *Hamling* v. *United States*, 418 U.S. 87 (1974); *Jenkins* v. *Georgia*, 418 U.S. 153 (1974).

6. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

ually related materials *within* Iowa; this Court has never identified an independent federal interest in regulating "obscenity." Indeed, Mr. Justice Harlan rejected any such claim, noting only a "limited [federal] interest"—not present here—in preventing the "thwarting of state regulation." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 457-58 n.2 (1966) (Harlan, J., dissenting); see *United States* v. *Orito*, 413 U.S. 139, 144 n.6 (1973).[7]

Absent a federal interest, the Court has demanded a clear manifestation of Congressional intent before extending federal criminal proscription to matters within traditional state jurisdiction. In *United States* v. *Bass*, 404 U.S. 336 (1971), the Court overturned a conviction under federal law for possession by a felon of a handgun, refusing to apply the statute to purely intrastate possessions. The Court first noted (*id.* at 348 n.15) that many states do not have laws that prohibit felons from possessing firearms, then stated:

> "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In *Rewis* [v. *United States*, 401 U.S. 808 (1971)], we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, 'would alter sensitive federal-state relationships [and] could overextend limited federal police resources.' While we noted there that '[i]t is not for us to weigh the merits of these factors,' we went on to conclude that 'the fact that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach].' 401 U.S., at 812." *Id.* at 349-50.

In *United States* v. *Kirby*, 74 U.S. (7 Wall.) 482 (1868), the Court peremptorily reversed a criminal conviction of a local

7. Any claim of a federal interest must satisfy the "compelling interest" test that applies to statutory schemes affecting First Amendment rights. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); see *Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976); *Procunier* v. *Martinez*, 416 U.S. 396, 409-12 (1974); *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

sheriff under a federal statute prohibiting interference with the mails arising from the sheriff's lawful arrest of a mail carrier. The Court stated:

> "The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. . . . But whether legislation of that character [applying to lawful conduct] be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language." *Id.* at 486; see Br. for Petitioner at 29-32.[8]

Professor Mishkin has stated the governing rule in resolving federal-state choice of law issues: "Our federalism . . . seems to posit generally that in case of doubt, the courts should use state law, leaving new extensions of federal power to the legislative body." Mishkin, *supra* at 814 n.64; see Hart, *supra* at 497-98. This is particularly true where the refusal to apply state law may have adverse local consequences. *Reconstruction Finance Corp.* v. *Beaver County*, *supra*, 328 U.S. at 210; see Mishkin, *supra* at 803-04.

Here a decision not to adopt Iowa law effectively nullifies Iowa's express determination to permit the distribution of sexually related materials among its citizenry.[9] The pervasive impact of the United States mails and other federal instrumentalities on the distribution of materials would necessarily make the federal prohibition the dominant standard. As recognized by the Court in *Lamont* v. *Postmaster General*, 381 U.S. 301, 305 n.3 (1965):

> " 'Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now

8. In an illogical twist to the Court's clear manifestation requirement, the Government cites a number of recent Congressional enactments expressly conditioning federal criminal statutes on state law. (Br. 14-15.) It then asserts that, by negative implication, the failure of Congress in 1873 expressly so to condition 18 U.S.C. § 1461 reflects a Congressional intent to ignore state law.

9. Affirmance of the decisions below would also nullify the similar determinations of a number of other state legislatures. See Brief for the United States at 10; Brief on Behalf of Association of American Publishers, Inc., *et al.*, as Amici Curiae, at 15-16.

> the main artery through which the business, social, and personal affairs of the people are conducted . . . .'"

In their amici curiae brief, the Association of American Publishers, Inc., *et al.*, state at 4-5, "[i]t is the rare book, periodical or film that does not also move through the mails or touch upon interstate or foreign commerce."

Hence, the Government's claim, that its interpretation of 18 U.S.C. § 1461 "does not violate or impede any state policy or standard governing matters within the proper sphere of state regulation" (Br. 20), is plain wrong. Just as this Court has acknowledged the right of state legislatures to prohibit "obscenity" based on inconclusive scientific data of a correlation between exposure to sexually related material and crime, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 60-61 (1973), so it must recognize the right of state legislatures to reject that data and permit access to such materials by its citizenry.

The entire thrust of the *Miller* decisions, in adopting the "contemporary community standards" test, accords respect, within constitutional limits, to the prerogatives of each state to determine how it will treat sexually related material. This approach was taken precisely to honor the diversity of tastes and attitudes prevalent in our Nation.

> "The use of 'national' standards, however, necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." *Miller* v. *California, supra*, 413 U.S. at 32 n.13.

Thus, Jerry Lee Smith's conviction for distributing within Iowa materials acceptable under Iowa law presents the very situation the *Miller* decision sought to prevent.

B. Under the Miller Line of Cases, the Iowa Legislature's Decision Establishes the Applicable "Contemporary Community Standards."

The Government misreads the *Miller* cases to avoid the impact of the "contemporary community standards" test on federal "obscenity" prosecutions. The Government first argues that "contemporary community standards" apply solely to the issue of "prurient interest." (Br. 7.) It then asserts that "prurient interest" is solely a factual inquiry, not a legislative policy issue. (Br. 20.) Finally, the Government contends that Iowa's legislative decision to permit distribution of sexually related material among Iowa adults does not establish "contemporary community standards" binding on Iowa jurors in considering the "fact" question of "prurient interest." (Br. 19.)

This argument is a distortion of the *Miller* decisions. It fails in its initial premise that the "contemporary community standards" test is limited to "prurient interest." That defect is compounded by the Government's description of "obscenity" as a factual absolute rather than a variable concept under the "contemporary community standards" approach. Finally, the argument relies on the anarchistic notion, adopted below, that jurors are free to redetermine what their legislature declares to be the community's values.

The "contemporary community standards" test applies to each of *Miller's* three independent requirements—"prurient interest," "patent offensiveness," and "lack of serious literary, artistic, political or scientific value." The Government attempts to read the statement of the "contemporary community standards" test as restricted to "prurient interest" simply because its first appearance in *Miller* is in clause (a) of the Court's three part formulation of the necessary elements of "obscenity." (Br. 9.) Yet the entire thrust of *Miller* and its progeny demonstrate the patent error of the Government's myopic reading of the cases.

In *Miller*, the Court, in fact, stated:

> "In sum, we . . . hold that obscenity is to be determined by applying 'contemporary community standards. . . .'" 413 U.S. at 36-37 (emphasis added).

The Court also indicated elsewhere in *Miller* that the "contemporary community standards" test applies to the "patently offensive" element of its definition of "obscenity." *Id.* at 30. In *Hamling* v. *United States*, 418 U.S. 87, 104, 105, 107, 114 (1974), the Court repeatedly referred to the "contemporary community standards" test as applying to the entire *Miller* formulation. Mr. Justice Brennan's concurring opinion in *McKinney* v. *Alabama*, 96 S. Ct. 1189, 1200 (1976), interpreted the Court's "contemporary community standards" test as applying to the "patently offensive" issue. See *United States* v. *B & H Distributors Corp.*, 375 F. Supp. 136, 141 (W.D. Wis. 1974); F. Schauer, The Law of Obscenity, 102-05, 123 (1976).

Indeed, the rationale for proscription of "obscenity" is that it is offensive to the community. This is clearly reflected in the history of the "patently offensive" element of the *Miller* test. That element was articulated by Mr. Justice Harlan in *Manual Enterprise, Inc.* v. *Day*, 370 U.S. 478, 482-86 (1962).

He noted:

> "'There is no obscene libel unless what is published is both offensive according to current standards of decency and calculated or likely to have the [prurient appeal] effect . . . .'" *Id.* at 485, quoting *Regina* v. *Close*, [1948] Vict. L. R. 445, 463.

Mr. Justice Brennan expressly made the "patently offensive" test subject to community standards:

> "[M]aterial is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966).[10]

10. *Miller's* criticism of *Memoirs* is limited to the abandonment of the *Memoirs* "utterly without redeeming social value" test. 413 U.S. at 22-25.

The Government, however, argues that the "patently offensive" test for federal prosecutions applies without reference to "contemporary community standards" and is satisfied if the materials contain "'descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.'" (Br. 16 n.7.) But the *Miller* depiction examples are on their face qualified by the term "patently offensive."[11] "Patent offensiveness" cannot exist in the abstract; somebody must be offended. Under *Miller*, that somebody is the local community.

Recognizing the essential proposition that in a democratic republic the legislature is the institutional mechanism for establishing societal values, the Court has expressly ruled that state legislatures are empowered to set statewide community standards. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). The Court has emphasized the states' "considerable latitude" in setting such "contemporary community standards" and acknowledged their right to legalize the distribution of sexually related material. *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 64; Br. for Petitioner 14-16.

Thus, the "contemporary community standards" approach by design makes "obscenity" variable from community to community depending upon their differing attitudes. The Court in *Miller* declared that what may be offensive, and therefore "obscene," in one community, may be acceptable, hence constitutionally protected, in another. It was precisely to permit this diversity that the Court rejected "national" standards. *Miller* v. *California*, *supra*, 413 U.S. at 32-33; see *Hamling* v. *United States*, *supra*, 418 U.S. at 106.

11. The depiction examples in *Miller* v. *California*, *supra*, 413 U.S. at 24, are:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

The Government asserts that the Iowa Legislature's decision to follow its acknowledged option to decriminalize "obscenity" does not establish "contemporary community standards." It states that the Iowa Legislature's action is no more than a decision not to prosecute. (Br. 11.)[12] Yet if a state legislature can be said to establish "contemporary community standards" when it declares that certain material will not be tolerated for distribution within the community, it appears self-evident that a legislature, in determining that such materials will be tolerated, likewise is setting "contemporary community standards."

Finally, the Government claims that the admission of the Iowa statute into evidence for consideration by the jury in determining "contemporary community standards" regarding "prurient appeal" was sufficient. (Br. 19-21.) As discussed in petitioner's main brief at 18-22, under our representative form of government, jurors do not have the right to redetermine the legislature's declaration of permissible conduct. The remedy, in the event of a disagreement between the people and their elected representatives, is the ballot box, not the jury box.

II.

THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1461 RENDERS THE STATUTE UNCONSTITUTIONALLY VAGUE AS APPLIED IN THIS CASE.

The Government's only answer to the vagueness problem created by Jerry Lee Smith's prosecution for *intra*-Iowa mailings is the claim that 18 U.S.C. § 1461 put him on notice that "if he distributed obscene material through the mails, he would violate it." (Br. 21.) The question is not whether Jerry Lee

12. The Iowa statute, Iowa Code Ann. ch. 725, directly provides that the statutory prohibition on the distribution of certain sexually related materials to minors is "intended" to be the "sole and only regulation" of sexually related materials in Iowa. *Id.* § 725.9. That statute expressly repealed the prior prohibition on the distribution of "obscenity" to adults.

Smith had notice of the proscription; rather, it is how he could determine what would be "obscene" under that statute.

The statute provides no definition. The only guidance is found in the decisions of this Court. The decisions direct that "obscenity" be measured according to "contemporary community standards." Logically, that requires an examination of the laws governing conduct within the community. In Jerry Lee Smith's case, the law of the community permitted the distribution of all sexually related material. If the community's law can be disregarded in these circumstances, as the Government suggests, there simply are no ascertainable standards. Prosecution and imprisonment under such a statutory scheme is fundamentally unfair and impermissible under the due process clause of the Fifth Amendment. (Br. for Petitioner 34-37.)

The Government's response is that Jerry Lee Smith should have known that the materials he distributed were, as a factual matter, "prurient" and contained depictions of sexual conduct given as examples in *Miller* of the type of material which could be prohibited. (Br. 22.) That argument is but a restatement of the Government's theory that "contemporary community standards" are limited to the "fact" issue of "prurient interest." This erroneous reading of the *Miller* decisions is demonstrated above in Section I(B).[13]

In *United States* v. *Bass*, *supra*, 404 U.S. at 348 n.15, the Court recognized the "real" notice problem presented when federal law proscribes conduct lawful in the state in which it occurs. The *Bass* situation, discussed *supra* at p. 6, did not

13. The Government's assertion, that "[p]etitioner makes no claim that the materials he distributed are not the kind of hard core pornography to which the statute may constitutionally be applied" (Br. 22), is not true. Petitioner never admitted, and the jury did not find, that the materials distributed were "hard core pornography," whatever that may be. Moreover, the issue in this case is not "hard core pornography," but whether the materials distributed by Jerry Lee Smith can be found "obscene" under *Miller*, given the "contemporary community standards" established by the Iowa Legislature.

even involve the compounding factor present here, where the Court has directed an individual, in considering application of the federal proscription, to measure his conduct by reference to "contemporary community standards."

III.

THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1461 REQUIRES VOIR DIRE CONCERNING POTENTIAL JUROR KNOWLEDGE OF "CONTEMPORARY COMMUNITY STANDARDS."

The Government contends that the District Court properly denied petitioner's proposed *voir dire* inquiry of potential juror knowledge of the "contemporary community standards" in Iowa, because it "related to legal issues." (Br. 24.) But the Government fails to perceive the distinction between questions that define a legal concept and *voir dire* inquiry that probes juror capacity to understand and apply the legal concepts. The Government's cited cases address only the former, while petitioner's proffered questions were designed to accomplish the latter.

The definition of legal concepts, such as "reasonable doubt," "presumption of innocence," or "entrapment," is indeed the province of the judge's jury instructions. But inquiry into juror *ability* to apply those instructions is precisely the purpose of *voir dire*—"to test the qualifications and competency of the prospective jurors." *Hamling* v. *United States, supra,* 418 U.S. at 140. The necessity for such *voir dire* is sharply focused by the Government's assertion that jurors can redetermine their legislature's declaration of "contemporary community standards."

CONCLUSION.

Petitioner Jerry Lee Smith's judgment of conviction must be reversed.

Respectfully submitted,

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Dated: December 4, 1976.

IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1439

JERRY LEE SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON BEHALF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., AMERICAN BOOKSELLERS ASSOCIATION, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., MOTION PICTURE ASSOCIATION OF AMERICA, INC. and PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., AS *AMICI CURIAE*, IN SUPPORT OF THE PETITIONER

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Statement

The Association of American Publishers, Inc., the American Booksellers Association, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the Motion Pic-

ture Association of America, Inc. and the Periodical and Book Association of America, Inc. (collectively referred to as *amici*) submit this joint brief, *amici curiae,* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the petitioner, Jerry Lee Smith. This joint brief is submitted upon the written consent of both parties.[1]

The *Amici*

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State of New York. It is the major national association of publishers of general books, textbooks and educational materials in the United States. Its approximately two hundred and ninety members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish in the aggregate the vast majority of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities throughout the United States.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers throughout the United States. ABA's approxi-

1. The originals of respondent's written consent, by the Solicitor General of the United States, and of petitioner's consent, by Kirkland & Ellis, Esqs., to the several *amici* are being filed herewith.

mately five thousand members consist of chain operations, private bookstores, department store book departments and university bookstores.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state in the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Motion Picture Association of America, Inc. is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States.

The Periodical and Book Association of America, Inc. is a New York not-for-profit association of publishers of magazines and paperback books who share a common interest in the sale of their products through independent wholesaler distribution channels throughout the United States.

Interests of the *Amici*

This case involves a federal criminal prosecution for the mailing of allegedly obscene materials in violation of 18 U.S.C. §1461 (1970). The allegedly illegal acts transpired entirely within a single state (Iowa) whose state law —which preempts local option—presently permits dissemination of such materials to consenting adults.[2] Petitioner was nonetheless convicted in a federal court on the theory that the federal jury could, if it so chose, apply its own view of the applicable community standard, even if that view resulted in a verdict that would not have been permitted under Iowa's preemptive statute. Important and unresolved issues are therefore raised concerning the respective federal and state law enforcement roles in such circumstances under *Miller* v. *California,* 413 U.S. 15 (1973), and its progeny.[3]

Amici's members publish, produce, distribute and sell books, magazines, motion pictures and other related materials which are distributed and sold within each of the fifty states. Yet, it is the rare book, periodical or film that does not also move through the mails or touch upon interstate

2. *See generally, Iowa Code Ann.* §§725.1 *et seq.* (Cum. Supp. 1975). In a recent general criminal code revision, the Iowa legislature readopted certain limited restrictions on dissemination to adults. But these amendments, which carry misdemeanor penalties only, are not effective until January 1, 1978. Iowa Senate File 85, §2804.

3. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973); *Kaplan* v. *California,* 413 U.S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123 (1973); *United States* v. *Orito,* 413 U.S. 139 (1973); *Hamling* v. *United States,* 418 U.S. 87 (1974); *Jenkins* v. *Georgia,* 418 U.S. 153 (1974).

or foreign commerce. *Amici* thus have a very substantial interest in the relation between federal and state obscenity laws and the standards that may be applied to materials over which the federal government and the states may have concurrent jurisdiction.[4]

Amici's concern over government suppression of sexually-frank expression is neither recent nor casual. Their members too often find themselves faced with federal, state or local censorship which, *amici* believe, exceeds the constitutional limits of governmental action and abridges the freedom of speech and of the press. Even when *amici's* members have not been subjected to coercive legal action, the ever-changing and often inscrutable standards for determining the parameters of First Amendment protection in this area have subjected them to the more subtle pressures that lead to self-censorship—a result equally inimical to free expression.

Consequently, *amici* bring to this case a profound and also very practical belief in the need carefully to preserve First Amendment values. It is from this perspective that *amici* have concluded—and have so indicated to this Court in previous *amicus* submissions—that the *Miller* line of cases fails to strike a proper balance between free expres-

4. The potential concurrent federal jurisdiction established by Congress is far-reaching. In addition to use of the mails, 18 U.S.C. §1461—the statutory provision here in issue—federal jurisdiction extends to use of express companies and common-carriers, 18 U.S.C. §1462, interstate or foreign transportation by any other means, 18 U.S.C. §1465, and importation, 19 U.S.C. §1305(a). *See United States* v. *Orito,* 413 U.S. 139 (1973); *United States* v. *Sherpix, Inc.,* 512 F.2d 1361 (D.C. Cir. 1975); *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123 (1973).

sion and efforts to regulate or suppress sexually-oriented materials.[5]

However, it is unnecessary here to reargue the minimum constitutional standards governing censorship of sexually-explicit materials that this Court established in *Miller*. For it is within those standards that *amici* urge reversal of the judgment of the courts below.

Thus, *amici* respectfully submit, the judgment below runs squarely against both the letter and spirit of the

5. The grounds for *amici's* disagreement with *Miller* have previously been expounded by most of them at length. *See, e.g.*, Brief of Association of American Publishers, Inc., *Amicus Curiae,* and Brief on Behalf of the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., and the Periodical and Book Association of America, Inc., *Amicus Curiae,* in *Jenkins* v. *Georgia,* No. 73-557 (October Term, 1973); Motion and Brief of Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., Periodical and Book Association of America, Inc., American Booksellers Association, Inc., and National Association of College Stores, Inc., *Amicus Curiae,* in Support of the Petition for Rehearing in *Kaplan* v. *California,* No. 71-1422 (October Term, 1971).

Those briefs noted, *inter alia,* that although *Miller* holds that censorship must be limited to patently offensive "hard core pornography," the test it establishes—perhaps inevitably—has failed to achieve this limited goal. Many works traditionally afforded First Amendment protection have been prosecuted, have been threatened with prosecution, or have otherwise fallen prey to the chilling effects of *Miller's* vague standards and overbroad application. Equally unfortunately, the Court's sanction of even this limited form of censorship has deeply influenced the public's willingness to accept censorship of all controversial expression even when obscenity is not at issue. Finally, in a field where uniform constitutional principles should be paramount, *Miller's* reliance on "local standards" fosters inconsistency, insularity and prejudice, making it increasingly difficult to disseminate books, magazines and films intended for a nationwide audience without steering far clear of the hazy line between protected speech and obscenity. Indeed, the rulings by the courts below in the instant case demonstrate graphically *Miller's* potential for confusion and lack of predictability.

Miller line of cases; affirmance would constitute an unjustifiable—and unnecessary—disavowal of the federalist principles therein enunciated (Point I). Moreover, affirmance would negate the considered legislative judgment of Iowa as well as a substantial and growing number of other states that have found it appropriate to provide a greater standard of protection to sexually-explicit expression than this Court has so far held to be constitutionally required (Point II).

ARGUMENT

I

Federal nullification of Iowa's permissive legislative action is inconsistent with the federalist principles enunciated in *Miller* v. *California* and *Hamling* v. *United States* and is not justified by any congressional assertion of interest in controlling the standards of obscenity.

Amici respectfully suggest that it would be paradoxical indeed, in light of this Court's recent rulings, for the Court here to affirm the judgment below. Such a ruling would permit federal prosecutors and federal juries to circumvent—in effect to "nullify"—permissive state laws by applying potentially more restrictive (albeit undefined) federal standards of obscenity. This result would represent a disavowal of the federalist principles enunciated by the Court in *Miller, Hamling* and their companion cases.[6] Since Iowa's laws are well within the constitutional standards established by this Court in *Miller* and since, moreover, Iowa's legislation does not conflict with any expressed

6. *Miller* v. *California,* 413 U.S. 15 (1973); *Hamling* v. *United States,* 418 U.S. 87 (1974). *See also* cases cited in n.3, *supra.*

congressional interest in controlling the standards of obscenity, such a disavowal is totally unwarranted and inappropriate.

A. Federal nullification is inconsistent with the local standards approach of *Miller* and its progeny.

It has long been recognized that the federal legislative interest in the suppression or regulation of obscenity is a limited one. Mr. Justice Harlan, in discussing the proper interpretation of §1461, noted in *Roth* v. *United States*, 354 U.S. 476 (1957), that:

> "[T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear more direct responsibility for the protection of the local moral fabric." (concurring and dissenting opinion) *Id.* at 504.[7]

For similar reasons, in *Miller* v. *United States*, 413 U.S. 15 (1973), this Court declined to deprive the states of their traditional power to regulate obscenity, stating:

> "Nor should we remedy 'tension between states and federal courts' by arbitrarily depriving the States

7. Mr. Justice Harlan apparently drew from this analysis the further conclusion—one which has never been adopted by the Court—that the *constitutional* constraints applicable to the states through the Due Process Clause of the Fourteenth Amendment might be of a different and less restrictive nature than those applicable to the federal government under the First Amendment. *Amici's* position here that federal prosecutors ought not be permitted to override permissive state legislation should not be viewed as indicating assent to such a proposition.

> of a power [to regulate obscenity] reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day." *Id.* at 32.

Consistent with this viewpoint, in *Hamling* v. *United States*, 418 U.S. 87 (1974), this Court engrafted *Miller's* standards onto the provisions of 18 U.S.C. §1461. Once again, the holding of *Hamling*—that state or local standards will be used to define the contours of federal law—necessarily suggests that this Court considered federal statutory interests to be confined to protecting whatever the standards of the state or local community might be.[8]

Miller and its progeny consistently reiterate what the Court has considered to be the important *state* interests involved in the regulation of obscenity. These are said to include the traditional local police power over community environment, local commerce and public safety, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-58 (1973), and the historic local power generally to deal with obscenity, *Miller* v. *California*, *supra*, 413 U.S. at 29. On the other hand, the Court's failure to advert to any similar *federal* interests strongly suggests the impropriety of any effort to override state legislation, at least within minimum constitutional constraints, by the imposition of inconsistent federal *statutory* standards.

8. It is worth noting that *Hamling* involved application of §1461 to *interstate* dissemination, as the allegedly obscene materials there at issue were sent to "postal patrons *in various parts of the country*." 418 U.S. at 94 (emphasis added). The instant case, involving solely *intrastate* acts, is therefore an even clearer case for declining to preempt local or state standards by imposing an inconsistent federal standard.

Finally, it is noteworthy that *Miller* opted for local rather than national standards in part to avoid precisely the result obtained in the courts below. This Court there declined to adopt a rule which, it believed, would prevent a community from enacting a more permissive test than the hypothetical national standard, noting:[9]

> "The use of 'national' standards . . . necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." 413 U.S. at 32 n.13.

In light of the foregoing, at least where solely *intrastate* acts are involved and where no out-of-state interests are implicated, to permit federal nullification of the permissive policy expressed by the legislature of the State of Iowa would represent an unwarranted usurpation of decision-making which *Miller* and *Hamling* suggest is best left, within permissible constitutional limits, to the states themselves.[10]

9. *See* Point II, *infra*. It should be noted that *amici* continue to believe for the reasons stated in n.5, *supra*, among others, that it would be preferable—when vital constitutional rights are involved—to apply uniform nationwide standards rather than local standards.

10. It is undisputed that this case involves solely *intrastate* transactions. Although the question of *interstate* transactions is therefore not squarely presented and, consequently, the Court need not here decide the issue, *amici* believe that the arguments made in this brief would be generally applicable as well to interstate dissemination. *Amici* recognize that an additional question potentially raised in the case of interstate dissemination is that of the choice of law to be applied in the determination of obscenity. On that issue two recent cases suggest, in general accord with the principles advocated here, that the appropriate local standard should not be circumvented solely because of the fortuity of federal venue. *United States* v. *Various Articles of Obscene Merchandise*, Schedule No. 1303, 75 Civ. 4691 (S.D.N.Y. August 25, 1976) (Frankel, D.J.); *United States* v. *Elkins*, 396 F. Supp. 314 (C.D. Cal. 1975). *See also* Schauer, *Obscenity and Conflict of Laws*, 77 W. VA. L. REV. 377 (1975).

In sum, *amici* respectfully submit that by failing to give heed to the legislative judgment of the State of Iowa here, the courts below have ignored the unmistakable import of this Court's recent rulings. The decisions below have improperly nullified what must be considered under *Miller* to be a valid exercise of state power and should therefore be reversed.

B. Congress has asserted no independent federal interest in controlling the standards of obscenity.

The Court's emphasis in *Miller* and *Hamling* upon the importance of state and local interests in the control of obscenity is reinforced by the historic absence of any congressional assertion of an independent federal legislative interest in controlling the standards of obscenity to be applied to federal prosecutions.[11]

In enacting the federal obscenity laws, Congress provided neither a definition of obscenity nor an indication of how the constitutionally-required determination of "offense" to the contemporary community should be made. The pertinent federal laws—which have not been substan-

11. *Amici* express no opinion concerning—nor need the Court here decide—the precise reach of federal power to preempt state obscenity law by a "clear and manifest" intention to occupy the field. *Cf. National League of Cities* v. *Usery*, —— U.S. ——, 96 S. Ct. 2465 (1976). It is only suggested that absent such an intent, the state and local values that have been previously viewed by this Court as paramount in the obscenity field ought to be honored, subject to constitutional limits. However, respect for permissive state legislative action in these circumstances should not be read as in any way suggesting that *amici* now believe either that *Miller* was correctly decided or that a uniform federal constitutional standard—or for that matter a preemptive federal statutory standard more deferential to First Amendment principles—ought not be adopted.

tially revised since they were first introduced in the nineteenth century—assert no clear and manifest federal interests, but are merely the federal statutory embodiments of the minimum constitutional standards defined by this Court. Such vitality as they retain exists only by virtue of constant reinterpretation by this Court, most recently in *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123 (1973); *United States* v. *Orito,* 413 U.S. 139 (1973); and *Hamling* v. *United States,* 418 U.S. 87 (1974).

In short, there is presented here neither a manifest congressional intention to occupy the field nor any implicit conflict between federal and state statutory interests which would justify nullifying—in effect "preempting"—the permissive Iowa legislative action. *See Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 141-42 (1963); *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941). *Cf. Goldstein* v. *California,* 412 U.S. 546 (1973).

II

A separate standard for federal prosecutions would be destructive of important state legislative initiatives.

Miller v. *California,* 413 U.S. 15 (1973), mandated state initiatives—either legislative or judicial—to bring state obscenity laws into conformity with the minimum constitutional standards there defined. *Id.* at 24 and n.6. In so ruling, the Court did not preclude states from exceeding these minimum constitutional requirements by narrowing the scope of permissible censorship or, for that matter, eliminating all controls on obscenity.

Thus, in *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973), decided on the same day as *Miller,* the Court stated, per Chief Justice Burger:

> "[T]he States, of course, may follow . . . a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer. . . ." *Id.* at 64.[12]

Indeed, as earlier noted, this Court's view that the states should be free to adopt more liberal standards was one reason cited in *Miller* for the rejection of a national standard of obscenity.[13]

As detailed below, a significant number of states have found it appropriate as a matter of *legislative* choice to provide in various ways a greater standard of protection for sexually-explicit expression than this Court has so far held is *constitutionally* required.

Thus, while no state has eliminated all restrictions on the commercial sale or dissemination of sexually-explicit

12. In support of this proposition the Court referred to Mr. Justice White's observation, speaking for the Court in *United States* v. *Reidel,* 402 U.S. 351 (1971):

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. *This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances.*" *Id.* at 357 (emphasis added).

13. *See* Point I, *supra,* at 10.

materials, several states—including Iowa—have enacted reforms that either eliminate censorship of materials for consenting adults or otherwise go beyond *Miller's* imprecise constitutional standards to assure greater clarity and provide procedural safeguards in the application of state obscenity laws.

Amici favor such legislative initiatives. In varying degrees these reforms hold out the promise of ameliorating the vagueness, overbreadth and inconsistency *amici* believe inhere in the *Miller* standards.

There follows below an illustrative listing of some of the more significant policies which have been adopted among the several states as part of their determination to provide greater protection to sexually-oriented expression.[14]

1. Nonprohibition of obscenity for willing adults[15]

At present, some *eight* states have opted, as a matter of legislative preference, generally to adhere to the view that

14. The data in the following sections was prepared in cooperation with the Media Coalition, Inc., an organization that concerns itself with the impact of obscenity legislation on the exercise of First Amendment freedoms, and whose affiliated groups are all involved with book, magazine and film production and distribution. *Amici* are all members of the Media Coalition.

The data set forth represent, to the best of *amici's* knowledge, an accurate portrayal of the state of legislative developments in the obscenity field in the areas discussed. However, because these developments are diffuse and often poorly or slowly reported, it is possible that slight inaccuracies may inadvertently be reflected in this summary.

15. *Amici* have not attempted in this subsection to catalogue the various regulatory measures passed by a number of states to protect unconsenting adults from offensive "display" or "thrusting" of sexually-explicit materials.

no outright prohibition upon the dissemination of sexually-explicit materials to consenting adults need be adopted.[16] In so doing they have, in effect, chosen to approach the obscenity problem in the manner advocated, since *Miller*, by Mr. Justice Brennan:

> "that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 113 (1973) (Brennan, J. dissenting—joined by Justices Marshall and Stewart).

Those states which have opted not to suppress the availability of such materials to consenting adults are:

ALASKA, *Alaska Stat.* §§11.40.160—11.40.180 (Cum. Supp. 1974).[17]

COLORADO, *Colo. Rev. Stat. Ann.* §§18-7-101—18-7-106; 18-7-401 and 402; 31-15-401 (1976).[18]

IOWA, *Iowa Code Ann.* §§725.1 *et seq.* (Cum. Supp. 1975).[19]

MONTANA, *Mont. Rev. Codes Ann.* §94-8-110 (Spec. Crim. Code Supp. 1976).[20]

16. Of these, four states had adopted such provisions before *Miller* was decided (Alaska, Montana, New Mexico and Vermont); the other four have adopted them since *Miller*.

17. The only extant Alaska obscenity provisions regulate the distribution, exhibition or sale of "objectionable" *comic books* to any "person," *id.* §11.40.160, although it would seem evident that the central targets of the prohibition are materials likely to be distributed to minors.

18. In Colorado the adult exemption does not apply to "sadomasochistic" materials. *Id.* §18-7-104.

19. *But see* n. 2, *supra*, for certain recent, restrictive modifications of Iowa law, effective January 1, 1978.

20. In Montana the adult exemption does not apply to "pandering." *Id.* §94-8-110(1)(f).

NEW MEXICO, *N.M. Stat. Ann.* §§40-50-1—40-50-8 (Supp. 1975).
SOUTH DAKOTA, *S.D. Compiled Laws Ann.* §§22-24-28 *et seq.* (Supp. 1976).
VERMONT, *Vt. Stat. Ann.* tit. 13, §§2801—2807 (Supp. 1975).
WEST VIRGINIA, *W. Va. Code Ann.* §§61-8A-1—61-8A-7 (Cum. Supp. 1975).

2. Statewide standards

In *Jenkins* v. *Georgia*, 418 U.S. 153 (1974), this Court held that a state may, consistently with *Miller*, define the geographic community standard applicable to state obscenity cases. *Id.* at 157. *Seventeen* states have accordingly adopted *statewide* standards which may lessen the inconsistency and confusion inevitable in the application of literally thousands of potentially divergent local standards. Ten states have so acted by legislation and seven by judicial decision.

(i) Legislation:

ARIZONA, *Ariz. Rev. Stat. Ann.* §13-531.01 (Cum. Supp. 1975).
CONNECTICUT, *Conn. Gen. Stat. Ann.* §53(a)-193(a) (Supp. 1976).
MASSACHUSETTS, *Mass. Ann. Laws* ch. 272, §31 (Cum. Supp. 1975).
NORTH CAROLINA, *N.C. Gen. Stat.* §14-190.1(b)(2) (Cum. Supp. 1975).
NORTH DAKOTA, *N.D. Cnt. Code* §12.1-27.1-.01(4) (1976).
OREGON, *Ore. Rev. Stat.* §167.087(2)(b) (1975).
SOUTH DAKOTA, *S.D. Compiled Laws Ann.* §22-24-27(1) (Supp. 1976).
TENNESSEE, *Tenn. Code Ann.* §39-3010(G)(1974).

VERMONT, *Vt. Stat. Ann.* tit. 13, §2801(6)(B) (Cum. Supp. 1975).
WEST VIRGINIA, *W. Va. Code Ann.* §61-8A-1(7) (Cum. Supp. 1975).

(ii) Judicial Decision:

ALABAMA, *Pierce* v. *State*, 292 Ala. 473, 296 S.2d 218 (1974).
GEORGIA, *Slaton* v. *Paris Adult Theatre I*, 231 Geo. 312, 201 S.E. 2d 456 (1973).
ILLINOIS, *State* v. *Ridens*, 59 Ill. 2d 362, 321 N.E. 2d 264 (1974).
NEW YORK, *Heller* v. *State*, 33 N.Y. 2d 314, 307 N.E. 2d 805 (1973).
OKLAHOMA, *McCrary* v. *State*, 533 P.2d 629 (1974).
WISCONSIN, *Court* v. *State*, 63 Wisc. 2d 570, 217 N.W. 2d 676 (1974).
WASHINGTON, *J.R. Distributors, Inc.* v. *State*, 82 Wash. 2d 584, 512 P.2d 1049 (1973).

3. State preemption of local standards

Like the adoption of statewide standards, a state's decision to preempt concurrent local authority to legislate in the obscenity field also tends to ameliorate inconsistency by assuring statewide uniformity as to both regulatory schemes and standards.

Nine states have, to a greater or lesser degree, preempted local power over obscenity.[21] Those states are:

COLORADO, *Colo. Rev. Stat. Ann.* §18-7-101 (1976)[22]

21. Of these, three preempted local power prior to *Miller* (Idaho, Oregon and New Mexico); the remaining opted for state preemption after *Miller*.

22. Colorado's obscenity law preempts local standards concerning minors, sadomasochistic material, public display and the "printed word." *Id.* Colorado does, however, provide that localities may adopt obscenity provisions applicable to adults so long as they are not inconsistent with the state's minors law.

IDAHO, *Idaho Code* §18-4113 (Cum. Supp. 1975).
INDIANA, *Ind. Code* §§35-30-10.1-8 and 35-30-11.1-7 (*Ind. Ann. Stat.* §§10-2818 and 10-837, Burns, 1975).
IOWA, *Iowa Code Ann.* §725.9 (Cum. Supp. 1975).
NEBRASKA, *Neb. Rev. Stat.* §28-926.33 (Cum. Supp. 1974).
NEW MEXICO, *N. M. Stat. Ann.* §40-50-1 (Supp. 1975).[23]
NORTH DAKOTA, *N. D. Cnt. Code* §12.1-27.1-12 (1976).
OREGON, *Ore. Rev. Stat.* §167.100 (1975).
VERMONT, *Vt. Stat. Ann.* tit. 13, §2808 (Cum. Supp. 1975).[24]

4. Procedural safeguards

In an effort to avoid the inevitable uncertainty implicit in subjective judgments as to whether particular materials are obscene or not—and the consequent "chill" of protected expression—a total of *sixteen* states presently adopt one or another of several similar procedural safeguards for civil determination of the obscenity *vel non* of materials prior to the invocation of criminal sanctions.[25]

23. New Mexico's obscenity law applies only to dissemination to minors. Its preemption clause is likewise limited to local provisions concerning minors.

24. Vermont's obscenity law applies only to dissemination to minors. Its preemption clause is likewise limited to local provisions concerning minors.

25. Still other safeguards are provided in those states that have incorporated somewhat more narrowly-defined standards for obscenity than the "examples" and "basic guidelines" suggested in *Miller* v. *California, supra,* 413 U.S. at 24-25. For example, Connecticut has retained the "utterly without redeeming social value" test. *Conn. Gen. Stat. Ann.* §53a-193(a) (Supp. 1976). *See Roth* v. *United States,* 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966). Indiana and North Carolina have exempted "simulated" sex acts from the reach of their obscenity laws. *Ind. Code* §35-30-10.1-1(d) (1975); *N.C. Gen. Stat.* §14-190.1(c)(1) (Cum. Supp. 1975). A number of other states have attempted to devise clearer and more specific definitions of "simulated" sex acts. *See, e.g., Mass. Ann. Laws* ch. 272, §31 (Cum. Supp. 1975).

This Court has recognized the efficacy of such prior civil proceedings, stating:

> "[S]*uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments,* as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 55 (majority opinion of Burger, C.J.) (emphasis added). *Cf. McKinney* v. *Alabama,* —— U.S. ——, 96 S. Ct. 1189 (1976).

Seven states now require institution of "*mandatory*" prior civil or mandatory *in rem* proceedings and a finding of obscenity before a criminal action can be instituted.[26]

ARKANSAS, *Ark. Stat. Ann.* §§41-3563—41-3576 (1976).[27]
LOUISIANA, *La. Rev. Stat. Ann.* §14:106 (F)(1) (1974).[28]
MASSACHUSETTS, *Mass. Ann. Laws* ch. 272, §28C (Cum. Supp. 1975).[29]
NORTH CAROLINA, *N. C. Gen Stat.* §14-190.2 (Cum. Supp. 1975).
NORTH DAKOTA, *N. D. Cnt Code* §§12.1-27.1-05—12.1-27.1-08 (1976).

26. Of these, three adopted such mandatory procedural safeguards before *Miller* (Arkansas, Massachusetts and Wisconsin); the other four have adopted them since *Miller.* An eighth state, Mississippi, also enacted such mandatory safeguards. *See Miss. Code Ann.* §§91-31-5 *et seq.* (1972). However, the constitutionality of Mississippi's entire obscenity statute has been placed into doubt by a recent decision of that state's highest court, holding one section of the law—pertaining to moving pictures—unconstitutional. *See ABC Interstate Theatres, Inc.* v. *Mississippi,* No. 48,583 (Supreme Court of Mississippi January 1976).

27. Arkansas' prior *in rem* proceedings apply only to "mailable matter." *Id* §41-3566.

28. In Louisiana, the prior determination is not required as to certain "close-up depiction[s] of human genital organs so as to give the appearance of the consummation of ultimate sexual acts . . . ." *Id.*

29. Massachusetts' prior *in rem* proceeding applies only to "books." *Id.*

VERMONT, *Vt. Stat. Ann.* tit. 13, §2809 (Cum. Supp. 1975).[30]

WISCONSIN, *Wis. Stat. Ann.* §944.25(2)-(7) (Supp. 1975).[31]

Nine additional states have a variety of provisions generally creating procedures whereby the obscenity *vel non* of materials may be determined outside of criminal proceedings in a *"non-mandatory"* civil or *in rem* proceeding:[32]

ALABAMA, *Ala. Code* tit. 14, §374 (Supp. 1973).[33]
IOWA, *Iowa Code Ann.* §725.4 (Supp. 1976).
NEBRASKA, *Neb. Rev. Stat.* §28-926.20 (Cum. Supp. 1974).
NEVADA, *Nev. Rev. Stat.* §201.250 (4) (1973).
OHIO, *Ohio Rev. Code Ann.* §2903.15; §2907.36 (1974).
OKLAHOMA, *Okla. Stat. Ann.* tit. 21, §1040.14-16 (Cum. Supp. 1976).[34]
RHODE ISLAND, *R.I. Gen. Laws Ann.* §§11.31.1-(1)—(12) (1970).
VIRGINIA, *Va. Ann.* §18.2-384 (1975).[35]

30. Vermont's prior proceeding is mandatory only for "written matter in a book or other publication." Vermont also provides for a non-mandatory prior civil proceeding in other cases. *Id.* §2810.

31. The Wisconsin proceeding is applicable only to matter disseminated to minors.

32. Of these nine, eight adopted such non-mandatory prior civil proceedings before *Miller*. Only Iowa has adopted them since *Miller*. However, both Nebraska and Virginia readopted their non-mandatory procedures since *Miller*.

33. Alabama's proceeding applies only to "mailable matter."

34. The Oklahoma provision applies only to "mailable matter."

35. The Virginia proceeding is available only with regard to "books."

WASHINGTON, *Wash. Rev. Code Ann.* §9.68.060 (Supp. 1975).[36]

These many salutary legislative initiatives would be for naught if, as the courts below have apparently concluded, they could be circumvented by federal prosecution of activities now permitted within those states. Certainly, the intractable problems which this Court well knows inhere in any program of censorship should not be allowed to be exacerbated by a system that, on the one hand, encourages the local determination of standards of regulation but that, on the other hand, gives the federal prosecutor and, ultimately, the federal juror a mandate to nullify those standards.

Conclusion

The exercise of federal power in this case to create a standard of obscenity separate from, and more restrictive than, applicable state standards inevitably operates to supplant the judgment of the people of Iowa and the considered actions of their state legislators. *Amici* respectfully urge the Court to reverse the decision below, rejecting such federal nullification and according the states sufficient leeway to decide for themselves, within proper constitutional constraints, the extent to which regulation of sexually-oriented materials is in the interests of their citizens and whether they shall adopt standards and procedural safe-

36. The Washington proceeding applies only to "erotic materials" for minors.

guards that exceed the minimum protections found to be constitutionally required in *Miller* v. *California*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1439

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMICI CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION AND THE IOWA LIBRARY ASSOCIATION IN SUPPORT OF PETITIONER.

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Dated: September 8, 1976.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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INTEREST OF THE AMERICAN LIBRARY ASSOCIATION AND THE IOWA LIBRARY ASSOCIATION.[1]

The American Library Association, founded in 1876, is a nonprofit educational organization with its principal place of business in Chicago, Illinois. Its membership includes more than 34,000 libraries, library trustees and members of the public devoted to the development of library services in the United States. The Association is the chief spokesman for the library movement in North America and, to a considerable extent, throughout the world. Through its membership and its affiliate state library assocations, the American Library Association

1. Letters evidencing the consents of petitioner and the United States to the filing of this amici curiae brief have been lodged in the Clerk's Office.

represents more than 29,000 public, university and special libraries, 90,000 elementary and secondary schools and media centers and 120,000 librarians. The Iowa Library Association has 1,695 members representing the interests of member libraries, librarians, trustees and friends.

This case involves a criminal conviction by a federal jury for a wholly intrastate distribution of allegedly "obscene" materials through the United States mail; yet that distribution was lawful in the state in which it took place. This Court has ruled that the "obscenity" of materials must be measured by local community standards. Hence, the specific issue presented here is whether the conscious determination of a state legislature—that contemporary community standards in that state do not prohibit the distribution of arguably "obscene" materials to consenting adults—can be nullified by the subjective views of federal jurors. The larger issue, however, involves the constitutional propriety of criminally prosecuting a person prior to any notice that the material he distributed has been judicially determined "obscene."

The interest of the American and the Iowa Library Associations in this case relates to this broader issue. This interest reflects their continuing concern over the impact of "obscenity" regulations on the First Amendment rights of libraries and librarians, publishers, authors and the people they serve.[2]

The American library is an institution unique to American culture and tradition. Through libraries, citizens are provided essentially free access to books, periodicals, magazines, pamphlets, records, films, microfilms and other materials which they desire or require to satisfy their intellectual, emotional, recreational or professional interests. In providing this service in the free society mandated by our Constitution, it is and

2. In furtherance of this concern, the American Library Association has previously filed amicus curiae briefs in "obscenity" cases before the Court. See, *e.g.*, *Hamling* v. *United States*, 418 U. S. 87 (1974); *Jenkins* v. *Georgia*, 418 U. S. 153 (1974); *Miller* v. *California*, 413 U. S. 15 (1973).

has been the responsibiliity of libraries to make available books and other materials presenting all points of view probing contemporary problems, issues and attitudes. Consequently, libraries and librarians have historically resisted efforts to limit their collections to only those materials reflecting attitudes, ideas or literary styles bearing the imprimatur of governmental approval or the favor of a majority of the populace. As a result, the American library has become, in many respects, the Nation's most basic First Amendment institution. Indeed, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

This function—as guardians of the freedom to read—cannot be fulfilled if libraries and librarians are threatened with the prospects of criminal prosecutions. Yet the ruling of the Eighth Circuit Court of Appeals challenged here directly raises such prospects. Library collections usually include works having sexual content which might be deemed "obscene" under some standard. The well-recognized "sexual revolution" has been reflected in current literature and periodicals. The public's interest in sexual matters makes it logical and necessary for libraries to have materials with sexual content. Some of these materials, such as sex education books, are quite explicit. These works are frequently transmitted through the United States mail in connection with interlibrary loans.

Hence, under the Court of Appeals' decision, a librarian located in a state that has chosen to decriminalize the distribution of "obscenity" may be prosecuted under federal law. But that librarian has no basis for determining what will be "obscene" in those circumstances. Even the ready availability of hard core pornography in the community in which the library is located provides no guidance. Thus, a librarian could place *Catch-22*, *Manchild in the Promised Land*, *Portnoy's Complaint*, *Joy of Sex* or *Everything You Always Wanted to Know About Sex* on his shelves, and then discover, for the first time in the context of his criminal prosecution, that these books are deemed "obscene" by federal jurors.

This brief is submitted to persuade the Court, in its review of this case, to recognize that statutory schemes, which regulate the distribution of "obscenity" through criminal prosecutions prior to any judicial determination of the "obscenity" of the materials distributed, do not simply impact "smut peddlers"; they seriously curb the First Amendment rights of persons, like librarians. engaged in the distribution of constitutionally protected materials to the public.

Amici respectfully submit that the Court should adopt a requirement that *no criminal "obscenity" prosecution can commence prior to notice of a judicial determination in a civil proceeding that the material is "obscene"*. That proceeding should take place in an adversary context, with a right to prompt review, and the material should be measured under the prevailing standards in the applicable local community in which the distribution would have its impact. Such an approach harmonizes the competing interests of protecting First Amendment rights while, at the same time, permitting the local community to "[stem] the tide of commercialized obscenity."[3] This prior in rem procedure approach is the practical solution to the "intractable obscenity problem"[4] which has long besieged this Court.

3. *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 57 (1973).

4. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

ARGUMENT.

NO CRIMINAL "OBSCENITY" PROSECUTION SHOULD BE PERMITTED UNTIL THERE HAS BEEN A PRIOR JUDICIAL DETERMINATION IN A CIVIL PROCEEDING THAT THE MATERIAL IS "OBSCENE."

A. The Absence of a Prior Civil Proceeding Makes Any Concept of "Obscenity" Inherently Vague.

The result in this case confirms the need for a prior civil proceeding focused on the "obscenity" of a work as a constitutionally mandated prerequisite to any criminal prosecution for its distribution. Jerry Lee Smith was convicted and sentenced to jail notwithstanding the fact that his distribution of materials was lawful in the state in which it took place. Such a result is fundamentally at odds with the First Amendment and due process of law, as it manifests all the evils that the void for vagueness doctrine was designed to cure.

Laws are vague and, therefore, invalid, if they (1) do not provide the public with fair notice of what is prohibited, (2) are subject to arbitrary enforcement and application or (3) infringe on the exercise of protected rights. *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611 (1971); *Winters* v. *New York*, 333 U. S. 507 (1948). As stated in *Grayned* v. *City of Rockford, supra*, 408 U. S. at 108-09:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to

> be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'" [Footnotes omitted.]

Statutes that affect the area of First Amendment rights are particularly vulnerable to attack for vagueness; indeed, the "standards of permissible statutory vagueness are strict in the area of free expression." *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432 (1963). The Court has imposed these strict standards because it recognizes that "the freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963).

Under these standards, an approach to the regulation of "obscenity" which permits a criminal prosecution prior to a judicial determination in a civil proceeding that the material distributed is "obscene" is necessarily invalid. This fact is clear from the result below and becomes particularly self-evident when the impact of such a procedure upon libraries and librarians is considered.[5]

5. Libraries and librarians are not engaged in the "crass commercial exploitation of sex," *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 63 (1973), that has concerned the Court. See also *id.* at 57, 63, 64, 68; *Miller* v. *California*, 413 U. S. 15, 36 (1973). Nonetheless, the federal statute at issue here—18 U. S. C. § 1461—clearly applies, as do most other "obscenity" statutes, to libraries and librarians in their distribution of reading and other materials to the public. As demonstrated herein, the impact of these statutes on libraries and librarians is substantial, and ominous, for the continued free and robust dissemination of ideas.

1. The Concept of "Obscenity" Does Not Provide Fair Notice of What Is Prohibited.

To satisfy the requirements of due process of law, a criminal statute must be sufficiently definite in its description of what is prohibited to allow a person of reasonable intelligence to determine how to conduct himself. As stated in *United States* v. *Harriss*, 347 U. S. 612, 617 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." [Footnote omitted.]

See also *Rabe* v. *Washington*, 405 U. S. 313, 315-16 (1972) (per curiam).

As this Court has recognized, "obscenity . . . is not merely a generic or descriptive term, but a legal term of art," *Hamling* v. *United States*, 418 U. S. 87, 118 (1974), and the line between the "obscene" and the "nonobscene" is admittedly "elusive," *Stanley* v. *Georgia*, 394 U. S. 557, 566 (1969). Cf. *Miller* v. *California*, 413 U. S. 15, 24 (1973). What appeals to prurient interests, is offensive or lacks serious value depends upon the viewer or reader. A given work may appeal exclusively to the prurient interests of one person, be offensive to another, yet have serious scientific or artistic value for a third. This inherent "elusiveness" of the legal definition of "obscenity" is accentuated by the Court's ruling that the legal question of "obscenity" can only be established by a trier of fact applying the contemporary community standards of the "average person" in that community. *Miller* v. *California*, *supra*, 413 U. S. at 30.

Therefore, a distributor of materials, such as a librarian, is directed to evaluate his conduct with reference to the contemporary standards of the "average person" in the local community. But which local community standard applies? Many

libraries serve several communities, including combinations of urban and suburban communities and communities in different states. Furthermore, libraries indirectly serve dispersed and diverse communities through interlibrary loans.

While this Court has recognized the right of state legislatures to set statewide standards, it has also said that more localized standards can be applied. *Jenkins* v. *Georgia*, 418 U. S. 153, 157 (1974). No guidance is, therefore, provided on which of the potentially different local community standards should apply. Indeed, in *Jenkins*, the Court said that jury instructions "to apply 'community standards' [are appropriate] without specifying what 'community.'" *Id.*

Moreover, in reaching its verdict, the trier of fact—in many cases a jury—can disregard expert testimony as to the prevailing community standard.

> "["Obscenity"] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed. 1940). No such assistance is needed by jurors in obscenity cases; indeed, the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 56 n.6 (1973).

Now we are told by the Eighth Circuit Court of Appeals that the trier of fact in a federal "obscenity" prosecution can disregard a state legislature's express declaration of the contemporary community standards in that state. According to the Court of Appeals, the following statement in *Hamling* v. *United States*, *supra*, 418 U. S. at 105, vests the jury with total discretion to determine the applicable community standard and the dimensions of that standard:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on

> knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case."

If the Court of Appeals is correct in its interpretation of this statement, a librarian, in permitting access to a library collection, will do so entirely at his peril. Thus, a librarian's consultation with experts as to the potential "obscenity" of a work affords no significant protection, because such opinions can be disregarded by the trier of fact. Most librarians do not consider themselves qualified to determine whether a given work is legally "obscene" within the definition provided in *Miller*. Librarians do not receive any professional training that would qualify them to make such a judgment. Moreover, the librarian's own views of the serious literary, artistic, political or scientific value of a given work are irrelevant. Indeed, under the Court of Appeals' interpretation, a librarian could not even rely on state law or the fact that hard core pornography is lawfully distributed within the local community.

In reality, a librarian cannot know whether distribution of a given work will result in a criminal "obscenity" prosecution until a verdict is rendered. Shockingly, the determination of "obscenity" will come for the first time—as it did in the case at bar—in the context of a criminal prosecution for engaging in a distribution wholly lawful under state law.

As long as the concept of "obscenity" is dependent upon unspecified, unascertainable and shifting local community standards, it is too indefinite and meaningless to satisfy the due process mandate that any criminal statute provide fair, advance notice of what is prohibited.

2. The Concept of "Obscenity" Is Subject to Arbitrary Enforcement and Application.

The second vice of a vague statute is that it is readily subject to arbitrary and erratic enforcement and application. That the

concept of "obscenity," in the absence of a prior in rem proceeding, is subject to abuse is amply borne out by the judgment below. See *Jenkins* v. *Georgia, supra.* Jerry Lee Smith was convicted of a distribution of materials lawful under state law. As part of his defense, he proffered examples of "hard core pornography" then currently being distributed in the community. Apparently there were no arrests or convictions for the distribution of those materials. Given the elusiveness of the concept of "obscenity," people, such as librarians, engaged in the distribution of written and other materials are at the mercy of the local prosecutor's whim as to who should be prosecuted and the judge's or the juror's subjective view of what is "obscene."

The approach to the regulation of "obscenity" adopted by the Court of Appeals is, therefore, just as susceptible to abuse as the vagrancy statute in *Papachristou* v. *City of Jacksonville,* 405 U. S. 156 (1972). There, this Court unanimously struck down the statute, stating:

> "This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *United States* v. *Harriss,* 347 U. S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama,* 310 U. S. 88; *Herndon* v. *Lowry,* 301 U. S. 242." *Id.* at 162.

In *Miller,* the Court explained that a major factor militating against abuse would be the power of appellate courts to make an independent review of the "obscenity" of the materials involved:

> "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U. S. at 25.

However, the Court of Appeals' decision demonstrates how clearly *inadequate* that protection is. Permitting individual jurors

to determine the governing community standard concerning what is "obscene," without reference to expert testimony or even state law, effectively precludes appellate review of the jury's verdict, for the community standard applied can never be known.

3. The Necessary Effect of the Concept of "Obscenity" Is to Curtail Constitutionally Protected Rights by Compelling Self-Censorship.

In *Bantam Books,* the Court observed that the mere threat of criminal prosecution may be sufficient to prohibit the circulation of constitutionally protected publications.

> "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . . ." 372 U. S. at 68.

Indeed, the most constitutionally damaging consequence of a vague statute is the "chilling effect" that it has upon the exercise of protected rights. *Gooding* v. *Wilson,* 408 U. S. 518, 521 (1972); *Coates* v. *City of Cincinnati,* 402 U. S. 611, 619-20 (1971). That the unfettered right to distribute and receive "non-obscene" materials is constitutionally protected is beyond question. *Bantam Books, Inc.* v. *Sullivan, supra,* 372 U. S. at 65.

The necessary effect of permitting criminal "obscenity" prosecutions prior to any judicial determination that the materials distributed are "obscene" is to create a comprehensive censorship scheme that compels libraries, librarians and others to suppress the distribution of constitutionally protected materials.[6] A librarian can be convicted for the distribution of materials which he believes in good faith to be constitutionally protected. So long as the prosecuting officer has obtained the materials through simple removal from the library, even a minimal ex parte proceeding before a neutral magistrate is unnecessary. It is precisely this procedural framework that

6. The constitutionality of a statute must, of course, be tested by "the operation and effect of the statute in substance." *Near* v. *Minnesota,* 283 U. S. 697, 713 (1931).

chills the exercise of First Amendment rights. It places the burden of determining what is or is not "obscene" directly on librarians and other private individuals engaged in the distribution of materials to the public, with the penalty for a wrong guess being imprisonment.

Libraries and librarians have no economic incentives that justify a risk to their personal freedom to insure the widest, or, indeed, any distribution of a particular work.[7] Therefore, given the impossibility of predicting what will be declared "obscene," librarians are reasonably certain to omit all materials from their collections which, under any interpretation, could be declared "obscene." Such a course of action compels a review and "purge" of major portions of existing collections and cautious selection of future materials.[8]

7. Philosophically, however, libraries and librarians are dedicated to the public's freedom to read, and, to that end, they seek to provide access to as broad and varied a spectrum of materials, expressing as many diverse and controversial positions, as their budgets permit. The American Library Association's "Library Bill of Rights" provides in pertinent part:

"1. As a responsibility of library service, books and other library materials selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.

2. Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times; no library materials should be proscribed or removed from libraries because of partisan or doctrinal disapproval.

3. Censorship should be challenged by libraries in the maintenance of their responsibility to provide public information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."

8. The requirement that all works be reviewed for "obscene" content will have a significant impact on library operations and costs. The presence of "obscene" content cannot be determined without the review in the entirety of all works. Librarians do not, in most cases, review their acquisitions prior to purchase. Rather, they purchase on the basis of published reviews and requests from patrons, or through a blanket order system from publishers.

In any such "purge," librarians are certain to err on the side of caution. Hence, a library would be faced with the hard decisions of eliminating many materials from its shelves, materials such as *Catch-22*, *Manchild in the Promised Land*, *Portnoy's Complaint*, *Joy of Sex* and *Everything You Always Wanted to Know About Sex*, all of which have been recently described to librarians as "obscene." Therefore, the practice of permitting criminal prosecution without requiring a prior judicial determination of the "obscenity" of the materials being distributed necessarily inhibits the rights of libraries and librarians to distribute constitutionally protected materials. In violating the rights of librarians, the statute thereby violates the rights of library patrons to have access to constitutionally protected works. See *Smith* v. *California*, 361 U. S. 147, 154 (1959).

This Court has consistently mandated that any system of censorship provide adequate procedural safeguards.[9] Those holdings are based on the recognition that a censorship decision not to distribute constitutes a total and final prior restraint. As stated in *Freedman* v. *Maryland*, 380 U. S. 51, 57-58 (1965):

> "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." [Footnote omitted.]

In *Blount* v. *Rizzi*, 400 U. S. 410 (1971), the Court declared unconstitutional a censorship scheme, provided in the Postal Reorganization Act, that permitted the Postmaster General to

9. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 559-60 (1975); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 54-55 (1973); *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971); *Blount* v. *Rizzi*, 400 U. S. 410 (1971); *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968); *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43 (1961).

suspend use of the mail to individuals trafficking in allegedly "obscene" materials. The Court held that the scheme lacked the requisite procedural safeguards, which were defined as follows:

> "[T]o avoid constitutional infirmity a scheme of administrative censorship must: [1] place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; [2] require 'prompt judicial review'—a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and [3] limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination." *Id.* at 417; see *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 560 (1975).

The Court has declared other censorship schemes unconstitutional because of their inherently inhibiting effect upon protected speech. In *Smith* v. *California,* the censorship scheme was effectuated by a strict liability statute that prohibited the possession of "obscene" materials. The Court stated:

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." 361 U. S. at 154.

The censorship scheme effectuated by 18 U. S. C. § 1461—and other criminal "obscenity" statutes that do not require a prior in rem proceeding—obviously fails to satisfy these procedural requirements. The decision of a librarian to censor the distribution of a given work is clearly not reviewable. The librarian-censor has no obligation to seek review of his decision, nor would such an obligation be fair or reasonable.[10] Likewise, the librarian has no economic incentive to provide any notice of

10. As noted in *McKinney* v. *Alabama,* 96 S. Ct. 1189, 1194 (1976), "[t]he Constitution obviously cannot force anyone to exercise the freedom of expression which it guarantees."

his decision or to seek review; indeed, there are strong economic disincentives.[11]

Neither the publisher, the author nor the individual who is deprived of access to a book will have any way of knowing that he is a victim of censorship. Each, therefore, will be precluded by ignorance from seeking review of the librarian's decision. Consequently, the private censorship decisions compelled by the statute will be final in effect, despite the fact that this is a legal decision which librarians are not qualified by training to make.

Under the Court's existing precedents, a procedure like that employed in 18 U. S. C. § 1461—whereby the "obscenity" of a work is first determined in the context of a criminal prosecution for the distribution of that work—is void for vagueness due to its failure to provide adequate notice of what is criminally prohibited, its potential for abuse and its incursions on protected rights.

B. The Evils Inherent in the Vagueness of the Concept of "Obscenity" Are Minimized by a Requirement that No Criminal "Obscenity" Prosecution Commence Until the Material Is Ruled "Obscene" in a Prior Civil Proceeding.

The Court has consistently utilized procedural tools to protect against invasions of protected speech which inevitably flow from attempts to suppress "obscenity." "Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan, supra,* 372 U. S. at 66. But "a State is not free to adopt whatever

11. Librarians are concerned that a decision not to acquire a work on the ground that it may be "obscene" could be challenged by an author or publisher in that the determination, at least to the extent made by a public library, may constitute state action in violation of First Amendment rights. Furthermore, a censorship decision, if publicly identified as such, could subject a library or librarian to a suit for trade libel for designating a work "obscene."

procedures it pleases for dealing with obscenity . . . ." *Marcus* v. *Search Warrant*, 367 U. S. 717, 731 (1961). "Rather, the First Amendment requires that procedures be incorporated that 'insure against the curtailment of constitutionally protected expression . . . .'" *Blount* v. *Rizzi*, *supra*, 400 U. S. at 416, quoting *Bantam Books, Inc.* v. *Sullivan*, *supra*, 372 U. S. at 66. As recently emphasized in *McKinney* v. *Alabama*, 96 S. Ct. 1189, 1193 (1976):

> "[T]he procedures by which a State ascertains whether certain materials are obscene must be ones which ensure 'the necessary sensitivity to freedom of expression,' *Freedman* v. *Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 739, 13 L.Ed.2d 649, 654 (1965)."

This Court has already recognized that the most effective procedural tool for protecting First Amendment rights is a judicial determination of the "obscenity" of the materials involved in an adversary proceeding, with a right of prompt review. As stated in *Freedman* v. *Maryland*, *supra*, 380 U. S. at 58:

> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."

Consequently, in *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205, 210 (1964), the Court held that a seizure of all copies of a given title could not be authorized without a prior adversary hearing to "'focus searchingly on the question of obscenity.'" The Court reasoned that any other procedure would "not adequately safeguard against the suppression of nonobscene books." *Id.* at 208.

Mr. Justice Frankfurter recognized that a prior civil proceeding on the issue of "obscenity" serves to make a vague law specific and eliminates the "chilling" effect of possible criminal prosecution under unascertainable standards:

> "Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity." *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 442 (1957).

This Court has repeatedly approved those state "obscenity" statutes which require a judicial determination of the "obscenity" of the work in question in a civil proceeding prior to any criminal indictments. Mr. Chief Justice Burger recently stated in *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U. S. at 55:

> "[S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." [Footnote omitted.]

See also *Blount* v. *Rizzi*, *supra*, 400 U. S. at 420; *Freedman* v. *Maryland*, *supra*, 380 U. S. at 60; *Kingsley Books, Inc.* v. *Brown*, *supra*, 354 U. S. at 441-44.[12]

Librarians desire only to include in their collections works which they may legally distribute. Hence, self-censorship is unnecessary if they can be advised, through a noncriminal proceeding, of the works that are legally "obscene" and, therefore, prohibited to them. In order to abate the hazards to protected speech presented by the existing vague scheme of mandatory self-censorship, this Court should declare that no criminal prosecution for the distribution of allegedly "obscene" materials can be undertaken until there has been a prior judicial determination in a civil proceeding that the material is "obscene." That proceeding should take place in an adversary context, with a right

12. Although the Court recently struck down an in rem procedure statute in *McKinney* v. *Alabama*, the Court was careful to note:

> "Thus we need not condemn civil proceedings in general, see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 55, 93 S. Ct. 2628, 2633, 37 L. Ed. 2d 446, 455 (1973), to conclude that this procedure fails to meet the standards required where First Amendment interests are at stake." 96 S. Ct. at 1194.

to prompt review, and the material should be measured under the prevailing standards in the applicable local community in which the distribution would have its impact. The individuals affected should be provided reasonable notice of the determination and an opportunity to cease distributing the materials.[13]

Certainly, the Court should adopt an in rem procedure, at least for federal "obscenity" statutes like 18 U. S. C. § 1461 at issue in this case.[14] Mr. Justice Harlan emphasized that what may be permissible for the states in regulating "obscenity" is not necessarily appropriate for the federal government with its special charge for the protection of constitutional freedoms.

> "[T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. What Mr. Justice Jackson said in *Beauharnais, supra,* 343 U.S., at 294-295, about criminal libel is equally true of obscenity:

13. A judgment of "obscenity" in an in rem proceeding should be admissible in a subsequent criminal prosecution against an individual who persists in distributing the "obscene" material after receipt of notice of the prior determination. The "obscenity" of the material would still remain an essential element of the crime. Hence, if the prior determination of "obscenity" is to be binding on those persons with notice of and, therefore, an opportunity to participate in the in rem proceeding, that determination must be based on a beyond a reasonable doubt standard, *In re Winship,* 397 U. S. 358 (1970), and the right to a jury trial must be accorded, *Baldwin* v. *New York,* 399 U. S. 66 (1970); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). Persons only receiving subsequent notice of an in rem determination should have the right to relitigate the "obscenity" of the material, but the prior determination should be prima facie evidence that it is "obscene."

14. Notably, in *United States* v. *Thirty-Seven Photographs,* 402 U. S. 363 (1971), the Court interpreted 19 U. S. C. § 1305(a) regulating the importation of "obscene" material to include specified prompt judicial review procedures in accordance with the mandates of *Freedman* v. *Maryland.*

> 'The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquillity. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power . . . . When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.'

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do." *Roth* v. *United States,* 354 U. S. 476, 504-05 (1957) (Harlan, J., concurring and dissenting) (footnote omitted).

The federal government's mandate to protect First Amendment rights is the surest basis for requiring a prior civil proceeding before commencing a federal prosecution. As this Court has recognized, such a procedure is "the best possible notice." *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 55.

C. Requiring a Prior In Rem Proceeding Is Consistent with the Right of the Local Community to Limit the Distribution of Commercialized "Obscenity."

Amici recognize this Court's concern for permitting local communities, if they desire, to "[stem] the tide of commercialized obscenity." *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 57. But that goal is equally well served under a prior in rem procedure without the concomitant and impermissible infringement of First Amendment rights.

The local community can be as active in commencing civil proceedings as its "local community standards" dictate. The civil proceeding, involving, where necessary, injunctive relief, has been used effectively and is gaining increasing favor.[15] Such an approach properly focuses responsibility for enforcement of a community's own standards on those with the responsibility to do so.

To the extent deemed necessary to protect against short term distributions that might not permit authorities to move promptly in court, predistribution screening is certainly permissible so long as the procedural requirements of *Freedman* v. *Maryland* and *Blount* v. *Rizzi* are met. Furthermore, nothing prevents a local community from experimenting with reasonable "time, place, and manner" regulations deemed necessary. See, *e.g.*, *Young* v. *American Mini Theatres, Inc.*, 96 S. Ct. 2440 (1976);

15. That such civil proceedings are "gaining increasing favor among the States" was pointed out by Mr. Justice Brennan in his concurrence in *McKinney* v. *Alabama, supra,* 96 S. Ct. at 11.95. Several states require a mandatory prior civil or in rem proceeding to determine "obscenity" before a criminal prosecution can be instituted *e.g.*, Ark. Stat. Ann. §§ 41-3563 to -3576 (1976) (applicable only to "mailable matter"); La. Rev. Stat. Ann. § 14:106(F)(1) (1974) (not required for "close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts"); Mass. Ann. Laws ch. 272, § 28C (Cum. Supp. 1975) (applicable only to "books"); N. C. Gen. Stat. § 14-190.2 (Cum. Supp. 1975); N. D. Cent. Code §§ 12.1-27.1-05 to -08 (1976); Vt. Stat. Ann. tit. 13, §§ 2809—10 (Cum. Supp. 1975) (mandatory only for "written matter in a book or other publication"); Wis. Stat. Ann. § 944.25 (Cum. Supp. 1975) (applicable only to material disseminated to minors). Others have nonmandatory civil or in rem procedures to determine "obscenity" without a criminal proceeding *e.g.* Ala. Code tit. 14, ch. 64A (Cum. Supp. 1973) (applicable only to "mailable matter"; declared unconstitutional in *McKinney* v. *Alabama, supra;* Iowa Code Ann. § 725.4 (Supp. 1976); Neb. Rev. Stat. § 28-926.20 (Cum. Supp. 1974); Nev. Rev. Stat. § 201.250(4) (1973); Ohio Rev. Code Ann. §§ 2903.36—.37 (Page 1975); Okla. Stat. Ann. tit. 21, §§ 1040.14 § —.20) (Cum. Supp. 1975-1976) (applicable only to "mailable matter"); R. I. Gen. Laws Ann. §§ 11-31.1-12 (1970); Va. Code Ann. § 18.2-384 (1975) (available only for "books"); Wash. Rev. Code § 9.68.060 (Supp. 1974) (applicable only to "erotic materials" for minors). See also Commission on Obscenity and Pornography, *Report* 53 (1970).

cf. *Cox* v. *Louisiana,* 379 U. S. 536, 554-55 (1965). Similarly, a local community can prohibit pandering, cf. *Ginzburg* v. *United States,* 383 U. S. 463 (1966),[16] or proceed under its seizure powers, cf. *A Quantity of Copies of Books* v. *Kansas, supra.* These mechanisms provide a local community with ample tools for curbing the "crass commercial exploitation of sex." *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 63.

16. In prohibiting pandering, conduct would be regulated, not constitutionally protected speech.

CONCLUSION.

We submit that a prior in rem procedure provides a practical solution to "the intractable obscenity problem." Such an approach is the "sensitive tool" by which this Court can separate "legitimate from illegitimate speech," *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958), avoid the hazards of self-censorship and "compensate for the ambiguities" in the concept of "obscenity," *Mishkin* v. *New York*, 383 U. S. 502, 511 (1966).

As a consequence, librarians, authors, publishers and booksellers will not be compelled to engage in self-censorship. They will know the works prohibited to them. This in turn will eliminate, or at least minimize, the risk that the inherent elusiveness of the concept of "obscenity" will cause a person, like the petitioner Jerry Lee Smith, to "be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss, supra*, 347 U. S. at 617.

At the same time, the objectives of "obscenity" laws would be achieved. "Obscene" works could still be identified, their distribution could still be enjoined or controlled and persons persisting in distributing such works could still be vigorously prosecuted.

Accordingly, this Court should reverse the decision of the Court of Appeals for the Eighth Circuit and, in so doing, establish that no criminal prosecution for the distribution of allegedly "obscene" material can be undertaken prior to notice of a judicial

determination in an in rem proceeding that the material is "obscene."

Respectfully submitted,

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Dated September 8, 1976.

amicus brief

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
NO. 75-1439

JERRY LEE SMITH
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brief Amicus Curiae of Citizens for Decency Through Law, inc., in Support of the Respondent, United States of America.

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UNITED STATES CONSTITUTION

TEXTBOOKS

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OPINIONS BELOW

The unreported order of the Federal District Court for the Southern District of Iowa denying a motion for a new trial is reproduced at Exhibit "A" to the Brief herein. The unreported per curiam opinion of the United States Court of Appeals for the Eighth Circuit is reproduced at Exhibit "B" to the Brief herein.

JURISDICTION

The jurisdiction of the Iowa District Court was based on 18 U.S.C. § 3231. The jurisdiction of the Court of Appeals was founded upon 28 U.S.C. § 1291.

The judgment of the Court of Appeals was entered on February 13, 1976. A Petition for a Writ of Certiorari was filed on April 10, 1976, and granted on June 21, 1976. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the refusal of a federal court and jury to adopt the "contemporary community standards" consciously established by the Iowa Legislature, as the test for measuring "obscenity" in a prosecution under 18 U.S.C. § 1461 for a wholly intra-Iowa mailing of allegedly "obscene" materials ignore this Court's prior decisions and defy fundamental principles of our federalist system?

2. Did the Court of Appeals, in ruling that jurors can disregard the conscious determination of their state legislature to deregulate the distribution of sexually related matter to consenting adults in Iowa, render 18 U.S.C.

§ 1461 unconstitutionally vague as applied?

3. Did the District Court's refusal at voir dire to probe the prospective jurors' knowledge of the "contemporary community standards" in Iowa deny petitioner due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED

CHAPTER 725

OBSCENITY AND INDECENCY

725.1 DEFINITIONS. As used in this section and sections 725.2 to 725.10, unless the context otherwise requires:

1. "Obscene material" is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

2. "Material" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion

picture or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

3. "Disseminate" means to transfer possession, with or without consideration.

4. "Knowingly" means being aware of the character of the matter.

5. "Sado-masochistic abuse" means the infliction of physical or mental pain upon a person or the condition of a person being fettered, bound or otherwise physically restrained.

6. "Minor" means any person under the age of eighteen.

7. "Sex act" means any sexual contact, actual or simulated, between two or more persons, either natural or deviate, or between a person and an animal, by penetration of the penis into the vagina or anus, or by contact between the mouth and genitalia or anus, or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

725.2. DISSEMINATION AND EXHIBITION OF OBSCENE MATERIAL TO MINORS. Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.3. ADMITTING MINORS TO PREMISES WHERE OBSCENE MATERIAL IS EXHIBITED. Any person who knowingly sells, gives, delivers or provides a minor with a pass or admits a minor to premises

where obscene material is exhibited is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.4. CIVIL SUIT TO DETERMINE OBSCENITY. Whenever the county attorney of any country has reasonable cause to believe that any person is engaged or plans to engage in the dissemination or exhibition of obscene material within his county to minors he may institute a civil proceeding in the district court of the county to enjoin the dissemination or exhibition of obscene material to minors. Such application for injunction is optional and not mandatory and shall not be construed as a prerequisite to criminal prosecution for a violation of sections 725.1 to 725.10.

725.5. EXEMPTIONS FOR PUBLIC LIBRARIES AND EDUCATIONAL INSTITUTIONS. Nothing in sections 725.1 to 725.10 prohibits the use of appropriate material for educational purposes in any accredited school, or any public library, or in any educational program in which the minor is participating. Nothing in said sections prohibits the attendance of minors at an exhibition or display of art works or the use of any materials in any public library.

725.6. SUSPENSION OF LICENSES OR PERMITS. Any person who knowingly permits a violation of section 725.2 or 725.3 to occur on premises under his control shall have all permits and licenses issued to him under state or local law as a prerequisite for doing business on such premises revoked for a period of six months. The county attorney shall notify all agencies responsible for issuing licenses and permits

of any conviction under section 725.2 or 725.3.

725.7. EVIDENCE CONSIDERED. At a trial for violation of sections 725.2 and 725.3 the court may consider the material, and receive into evidence in addition to other competent evidence, the offered testimony of experts pertaining to:

1. The artistic, literary, political or scientific value, if any, of the challenged material.
2. The degree of public acceptance within the community of the material or material of similar character.
3. The intent of the author, artist, producer, publisher or manufacturer in creating the material.
4. The advertising promotion and other circumstances relating to the sale of the material.

725.8. AFFIRMATIVE DEFENSE. In any prosecution for disseminating or exhibiting obscene material to minors, it is an affirmative defense that the defendant had reasonable cause to believe that the minor involved was eighteen years old or more and the minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was eighteen years old or more or was accompanied by a parent or spouse eighteen years of age or more.

725.9. UNIFORM APPLICATION. In order to provide for the uniform application of the provisions of sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no municipality, county or other governmental unit within

this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974.

TITLE 18, CHAPTER 71, SECTION 1461 OF THE UNITED STATES CODE, PROVIDES IN PERTINENT PART:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and --

* * * * *

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made,...

* * * * *

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation or disposing thereof, or aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more

than ten years, or both, for each such offense thereafter."

STATEMENT OF THE CASE [1]

By virtue of an indictment filed March 26, 1975, petitioner Jerry Lee Smith was charged with seven counts of placing non-mailable matter in the United States Mails in violation of Title 18, United States Code, Section 1461 and 2. (Appendix pp.3-7)

Trial commenced on September 8, 1975, and the jury reached a verdict of guilty on all seven counts on September 9, 1975. (Appendix p.13).

On October 14, 1975, petitioner was sentenced to a term of three years imprisonment on each count with all but six months of this term suspended. Petitioner was also sentenced to three years probation on each count. The sentences on each count were to run concurrently. On the same day, petitioner filed his appeal. (Appendix pp.35-36).

Prior to the selection of the jury on September 8, 1975, petitioner filed the following list of proposed voir dire questions for prospective jurors. (Appendix p.8).

1/ See agreed "Statement of the Case" at pages 38-41 of the Appendix.

1. Are any members of the panel a member of or are in sympathy with any organization which has for its purpose the regulating or banning of alleged obscene materials?

2. Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

(The following individual questions are requested for each juror who answers the above question in the affirmative.)

3. Where did you acquire such information?

4. State what your understanding of those contemporary community standards are?

5. In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity?

6. State what your understanding of those laws are.

The court accepted in substance Requested Instruction No. 1 but denied all other requests. In addition, the trial court denied petitioner

the right to make oral inquiries of a similar nature to the jury. (Appendix p.38).

Evidence offered by the Government established the following facts:

1. At Des Moines, in the Southern District of Iowa, on or about February 1, 1974, petitioner knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 4 and 4A.

2. At Des Moines, in the Southern District of Iowa, on or about June 25, 1974, petitioner knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 10, 10A, 10B, 10C, 10D, 10E, 10F, 10G, 10I, 10J, 10K, 10L, 10M, 10N, 10O, 10P, 10Q, and 10R.

3. At Des Moines, in the Southern District of Iowa, on or about June 27, 1974, petitioner knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 6, 6A, 6B, 6C, 6D, 6E, 6F, 6H, 6I, 6J, 6K, 6L, 6M, 6N, 6O, and 6P.

4. At Des Moines, in the Southern District of Iowa, on or about July 10, 1974, petitioner knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr,

Iowa 50854, Trial Exhibits 12, 12A, 12B, 12C, 12D, 12E, 12F, 12G, 12H, 12I, 12J.

5. At Des Moines, in the Southern District of Iowa, on or about July 30, 1974, petitioner knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 14, 14A, 14B, and 14C.

6. At Des Moines, in the Southern District of Iowa, on or about July 30, 1974, petitioner knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 7 and 7A.

7. At Des Moines, in the Southern District of Iowa, on or about October 2, 1974, petitioner knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 8 and 8A.

Further evidence offered by the Government established that the names and addresses of the above described addresses are fictitious. All mail sent to these names and addresses was delivered through the postal system to the Postmaster serving each address.

It was stipulated by the parties that the communities of Des Moines, Iowa, Guthrie

Center, Iowa, and Mount Ayr, Iowa, are all located within the Southern Judicial District of Iowa in the Federal judicial system.

Evidence offered by the petitioner established the following facts:

1. Trial Exhibits A-1 (porno magazine), A-2 (porno magazine), and A-3 (porno magazine) were available for purchase by adults at the Davenport Swingers World, Inc. Book Store in Davenport, Iowa on August 8, 1975.

2. Trial Exhibits B-1 (film), B-2 (film), B-3 (porno magazine), and B-4 (porno magazine) were available for purchase by adults at the Adult Dream Book Store in Des Moines, Iowa on August 12, 1975.

3. Trial Exhibits C-1 (film), and C-2 (publication) were available for purchase by adults at the Bachelors Library in Des Moines, Iowa on August 12, 1975.

4. Trial Exhibits D-1 (publication) were available for purchase by adults at the Adult Center Book Store in Des Moines, Iowa on August 12, 1975.

5. Trial Exhibits E-1 (publication) was available for purchase by adults at the Red Eye Book Store in Des Moines, Iowa

on August 12, 1975.

6. Trial Exhibits F-1 (publication), and F-2 (publication) were available for purchase by adults at the Discount Adult Book Store in Davenport, Iowa on August 14, 1975.

7. Pursuant to stipulation of the parties as to foundation Trial Exhibit G, a copy of Chapter 725 of the Iowa Code, was introduced into evidence.

8. Pursuant to stipulation of the parties as to foundation Trial Exhibits H, I, J, K, L and M (advertisements appearing in the Des Moines Register and Tribune for May 22, June 4, August 15, 16 and 22, 1975) were introduced into evidence.

At the conclusion of the Government's case, petitioner made a motion for judgment of acquittal which was denied. (Appendix p.41). Petitioner's motion at the close of all the evidence was also denied. (Appendix p.41).

The District Court instructed the jurors, in determining whether the materials distributed were "obscene," "to draw on your own knowledge of the views of the average person in the community," but left them free to disregard Chapter 725 of the Iowa Code and the lawful availability of comparable materials in their community.

(Appendix p.23).[2/]

2/ This Iowa problem has its roots in this Court's 1973 obscenity rulings wherein "specificity" was made a constitutional requirement. In Iowa v. Wedelstedt, 213 N.W.2d 652 (Dec. 19, 1973), the Iowa Supreme Court refused to follow this Court's lead regarding "judicial gloss" and struck the Iowa criminal statute as vague. Further, when a County Attorney attempted to utilize the Iowa civil public nuisance statute to halt the exhibition of "Deep Throat" in Marion, Iowa, the Iowa Supreme Court struck that defense for the same reason. See Iowa ex rel. Faches v. N.D.D., Inc. d.b.a. Marion Adult Theater, 228 N.W.2d 191, 192 (Apr. 16, 1973) where the Iowa Supreme Court said:

> "In State v. Wedelstedt, 213 N.W.2d 652 (Iowa 1973), we held unconstitutional a former criminal obscenity statute for vagueness and overbreadth. In State v. Kueny, 215 N.W.2d 215 (Iowa 1974), we held a criminal lewdness statute unconstitutionally vague. In the present case the State seeks to enjoin the movies under the sole claim the premises are used for the purpose of 'lewdness'. The term 'lewdness' is as vague when used in section 99.1 as it was in the sections we considered in Wedelstedt and Kueny. Section 99.1 cannot provide a basis for enjoining undefined 'lewdness'.
>
> "The State's argument fails because it looks only to what the statute can provide rather than considering what our statute actually provides. Miller and Paris Adult Theatre I hold only what our statutes could regulate. Under the foregoing authorities they failed to do so."

For a more correct view, historically and ethically, compare: People ex rel. Busch et al. v. Projection Room Theater et al., 16 Cal.3d

After the guilty verdict was returned, petitioner moved for a new trial (Appendix pp.29-30), which was denied by Order dated October 14, 1975. (Appendix pp. 32-34. See copy appearing at Exhibit "A" to this Brief Amicus Curiae).

Petitioner then appealed the District Court's rulings to the Eighth Circuit Court of Appeals. (Appendix p.37). In his appeal, petitioner raised the following legal issues:[3/]

(1) The Court erred in refusing defendant's

360, 546 P.2d 733, 128 Cal.Rptr. 229, vacated and new opinions substituted in 17 Cal.3d 42, 550 P.2d 600, 130 Cal.Rptr. 328 (June 1, 1976), petition for certiorari filed on Aug. 30, 1976 in this Court in Van de Kamp v. Projection Room Theater, No. 76-390 October Term 1976.

Although three bills were introduced during the 1974 legislative session (S.F.1057, S.F.1066 and H.F.1102), only House File 1102 succeeded in getting out of committee, being enacted as Chapter 725 of the Iowa Code. Further attempts to enact obscenity legislation during the 1975 session (S.F.219, H.F.513 and H.F.889) were similarly unsuccessful, with the bills being kept bottled up in committee. During the 1976 session, a conference committee succeeded in striking from the proposed revision of the Iowa Criminal Laws the controls which were to be imposed upon the sale of pornographic material to adults (See Des Moines Register news article of May 21, 1976, appearing at Exhibit "C" to this brief).

3/ See the agreed "Statement of Points Raised By Appellant in This Appeal" appearing in the Appendix at page 42.

requested questions for prospective jurors and refusing to allow defendant to make similar inquiries.

(2) The Court erred in not granting defendant's motions for judgment of acquittal made at the conclusion of the government's evidence and at the close of all evidence.

(3) The Court erred in not granting defendant's motion for a new trial.

The Court of Appeals affirmed per curiam. (Appendix pp. 44-46.)

SUMMARY OF ARGUMENT

I

Under Rule 24(a) of the Federal Rules of Criminal Procedure, the district court has a wide discretion as to what questions are proper on voir dire, which will not be disturbed, without a clear showing of abuse of discretion.

The individual juror's knowledge of the contemporary community standards relative to the depiction of sex and nudity in magazines and books is not a proper subject for voir dire examination. That inquiry is foreclosed, for such knowledge is presumed from the fact that such person has been chosen as a juror. The law presumes that a juror, if otherwise qualified to sit, has the requisite experience, drawn from

life and common speech, to aid in determining the acceptable mesne which most nearly satisfies the moral demands of a community. Judge Hand called the "verdict on obscenity" a "small bit of legislation ad hoc, like the standard of care which the Constitution imposes on a jury as a duty." The Court of Appeals was correct in its analogy to the "reasonable man" rule.

The voir dire examination ought not to be permitted to take an indefinite wide range covering collateral estoppel or incidental matters having some connection with the case. Questions relating to the individual juror's knowledge of the contemporary community standards are not proper because they do not bear on the juror's qualification to serve, or place his bias in question, but pertain rather to questions of law (presumed knowledge, if qualified to sit) and the ultimate question of guilt or innocence.

The trial judge's ruling was correct for yet another reason. Questions are improper which are calculated to give undo importance to any feature of the case. The questions were improper as an attempt to place before the jury the historical facts and legal issue which was a matter of law for the court to decide.

(i.e., the effect on the federal postal statute of the inability of the state legislature, after the Iowa Supreme Court's invalidating the Iowa obscenity statute, to enact state legislation which would criminalize the distribution of obscene materials to adults within the state of Iowa.)

Petitioner's reliance on Aldrich v. U.S. and Ham v. South Carolina is misplaced. The same arguments were advanced and rejected by this Court in Hamling v. U.S.

II

The application of 18 U.S.C. section 1461 to the use of the mails for the intrastate shipment of obscene materials is a proper exercise of federal power. Unlike the commerce power over obscene materials, which extends only to interstate transportation, the federal controls over postal matters encompass intrastate mailings as well. One of the landmark cases in this area, Ex Parte Jackson, 96 U.S. 727 (1877), involved intrastate facts similar to those presented in the cause herein, except that there the subject matter involved a lottery, and the deposit of a lottery ticket in the New York mails for delivery to a New York address.

Although Chapter 725 of the Iowa Code failed to impose criminal sanctions at the state level

against conduct involving the dissemination of matter to adults which would be obscene under Federal standards, the entire expression of the legislature is not clear. Amicus submits that such legislation did not, and could not, prevent the government from criminalizing such conduct at the local level and/or taking action to abate the same civilly as a public nuisance, nor did the Iowa legislation render such subject matter acceptable to the contemporary community standards.

The pre-emption provision of Chapter 725 of the Iowa Code is ambiguous. By its very language, the Statute purports to legislate as to material which is obscene to minors.

Section 725.9 entitled "Uniform Application", is clearly a pre-emptive provision, but, in view of the definitions section, there is a serious question as to whether such pre-emption was meant to extend to anything beyond that class of materials which is "obscene to minors". See State of Washington v. J.R. Distributing, Inc. 82 Wash. 2d 584, 512 P.2d 1049.

Chapter 725 of the Iowa Code should be interpreted as not effecting an implied pre-emption, so as to avoid a Constitutional confrontation with the Federal Postal statute.

The pre-emption which Petitioner urges

would be unlawful, as depriving the citizens of the local communities in Iowa of a federally protected right to live in a community whose public morals, moral values and environment are free from the degrading and corrupting influences of patently hard-core pornography.

The judiciary has a moral responsibility as the guardian of the people's morals. To recognize a "pre-emption" under the circumstances would deprive the citizens of the State of Iowa of:

(1) due process of law and equal protection of the law;

(2) the police power and "home rule" authority which is inherent in municipal authority; and

(3) one of the fundamental rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common decency" and to live in a community whose public morals, moral values and environment are free from the illegal, degrading and corrupting influences of such patently hard-core pornography.

Where government vice is involved, local government's power to abate the same is inherent, and plenary, and may not be interfered with,

not even at the level of the State Legislature. This Court has many times recognized that a legislative body may not bargain away its power to protect public morals nor excuse its failure to perform a public duty by saying it had been agreed, by legislative inaction, not to do so.

Remote language in Paris Adult Theater v. Slaton, Memoirs v. Massachusetts, and U.S. v. Reidel, cannot be read in a manner which would place those cases at odds with the above-stated legal principle. Whereas it is true that a state legislature may choose by inaction not to legislate in the criminal area, it may not, by that inaction, foreclose the right of a local government, such as a city, from applying rudimentary law to that subject matter which the universal judgment of mankind says "should be restrained." U.S. v. Roth.

The power of local government to protect the public morals of the local community against public conduct which is regarded as malum in se may not be interfered with.

The experience of all mankind condemns any occupation that tampers with the public morals and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally

regarded and condemned by it as a public nuisance.

There can be no question but that where a public nuisance exists within its corporate limits that is a "per se" nuisance at common law, a local government may abate the same under the common law. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated.

Even assuming that Chapter 725 of the Iowa Code was intended to effect a pre-emption which would guarantee the unrestricted distribution to adults in Iowa of hard-core pornography which under federal law would be obscene, such legislation would be invalid because in direct conflict with federal law.

Such legislative action would be in conflict with Art. I, section 10, of the Federal Constitution. The 1911 treaty entitled "Agreement for the Suppression of the Circulation of Obscene Publications" is a part of the law of every state. The State of Iowa may not legislate to encourage the dissemination of subject matter which the United States of America by treaty is required to discourage. Where a conflict exists between the provisions of a treaty and

the provisions of a state statute, the treaty invalidates such legislation.

Such legislative action would also be invalid under the "one people" concept regarding the federal police power. The "one people" concept of federalism, envisions the federal government as having been granted plenary power to control the mail and interstate commerce and being charged with the concommitant responsibility of adminstering those controls, which have been established at the national level by the State's representatives, in a way which will safeguard and maintain the standards of public decency (morality) which are common to the individual State members of the compact.

Under the "one people" concept, the federal government has total control over that subject matter which can be identified as hard-core pornography. Hard-core pornography is defined as that subject matter as to which reasonable minds would not differ and all would hold to be pornographic.

Contrary to petitioner's arguments, obscenity is not "predominantly a matter of state interest," but is, under the "one people" concept, a matter of state and federal interest. The independant federal interest has been identified by this Court in the well documented views of Justice

Harlan. The foundation for Harlan's views on hard-core pornography are to be found in the "one people" concept. In granting such power to the federal government over postal matters which were obscene, it was the expectation of the compact States that the federal government would administer such powers to suppress that subject matter which was considered to be injurious to the public morals which were common to all of the states.

In Congress, the several states have assembled and established a comprehensive set of federal controls of obscenity over: (1) importation from abroad, (2) use of the mails, (3) transportation in interstate commerce, and (4) international movement. In view of the comprehensive nature of such federal legislation, it is difficult to understand petitioner's claim that the Iowa legislature has "conclusively determined contemporary community standards" as against the federal claim that such matters may not be placed in the mails. Long ago this Court said in Champion v. Ames:

> "But surely it will not be said to be a part of anyone's liberty as recognized by the Supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be

confessedly injurious to the public morals."

and

> "We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end."

Such legislative action would also be invalid under the Supremacy Clause. When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause. Gibbons v. Ogden; Rice v. Santa Fe Elevator Corporation. On the question of whether hard-core pornography is to be tolerated, federal law has occupied the field.

The disposition of "hard-core pornography" inherently is a matter for federal control. In Congress assembled, representatives of the several states have established comprehensive federal controls on obscenity. Where the evidence clearly points to a total restraint on such subject matter (hard-core pornography) the Federal compact must prevail, and pre-emption is clearly operative.

The congressional intent has been clearly stated that obscenity shall not be given a free reign. Petitioner's contention that

Iowa state law, liberating obscenity, should be adopted because of the "silence of congress" is completely unsupported by the factual evidence. Public Law 90-100 made a specific finding that obscenity and pornography is a matter of national concern. See also Senate Resolution No. 477 which rejected the findings of the Commission which recommended the liberation of obscenity. Petitioner's argument also runs contrary to this Court's recent clarification in Hamling v. U.S. wherein it delineated what Congress has proscribed by 18 U.S.C. section 1461.

Contrary to Petitioner's arguments, this Court has not indicated, with regard to competing interests, that it recognized that regulation of obscenity is predominantly a matter of state, not federal interest, nor has the Court indicated that it has rejected any need for national uniformity. Solutions offered by the Court in those cases were arrived at in response to the problem of how to find an accommodation between the opposing interests of the First and Tenth Amendments,. That accommodation does not in any way dispute or deny the national need to provide controls which aid in the individual state efforts to suppress the worst of such materials — hard-core pornography — that which

lies at the bottom of the barrel.

If, as Petitioner argues "the test does not vary between Federal and State prosecutions" and "the same contemporary community standards should be applied in Federal as well as State prosecutions", then it must necessarily follow that one or the other must control since one legislative standard (Federal) criminalizes traffic in such matter, whereas the other (State) does not.

The principle which petitioner urges that an individual should receive uniform treatment in the state of his residence and that the same act should not be governed by two different standards must be examined in its proper context. While engaging in "Russian Roulette," Petitioner wants an assurance that he will not be killed. The law does not give him that assurance. So long as he operates in the mud, he is not entitled to the same consideration as those who reach for the stars.

In sum, the bent of the Federal law is to proscribe hard-core pornography. Petitioner's argument that to affirm the conviction will nullify state law without (1) a clear state of congressional intent, or (2) an inherently federal subject matter, is without merit. The answer to those contentions is found in Public

Law 90-100, the enactment of a comprehensive pattern of federal obscenity statutes, and the "one people" concept relating to the nature of the federal police power.

ARGUMENT

I

THE SIXTH AMENDMENT RIGHT TO TRIAL "BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED," AND THE FIFTH AMENDMENT GUARANTEE OF "DUE PROCESS OF LAW" DO NOT REQUIRE "VOIR DIRE" EXAMINATION OF JURORS ON THE QUESTION OF WHETHER THEY HAVE KNOWLEDGE OF THE CONTEMPORARY COMMUNITY STANDARDS.

A. The District Court Has A Wide Discretion As To What Questions Are Proper On Voir Dire, Which Will Not Be Disturbed, Absent A Clear Showing Of Abuse of Discretion.

Rule 24(a) permits a district court to conduct the voir dire examination, making use of questions submitted by the parties "as it deems proper."[4/]

4/ Rule 24(a) provides:
Rule 24. Trial jurors -- (a) Examination. -- The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Considerable discretion is lodged in the trial court as to what questions are deemed to be proper on voir dire, U.S. v. Cook, 270 F.2d 725, affirming 165 Fed.Sup. 212, and the prevailing rule is that a court's determination as to what questions should be put to the jury will not be disturbed without a clear showing of abuse of discretion. United States v. Blount, 479 F.2d 650 (1973, CA.6 Ohio).

B. The Individual Juror's Knowledge Of The Contemporary Community Standards Relative To The Depiction Of Sex And Nudity In Magazines And Books Is Not A Proper Subject For Voir Dire Examination.

Petitioner's justification for his question is stated in the Brief for Petitioner at page 4:

> "Petitioner sought only to determine whether the prospective jurors had any such knowledge."

That inquiry, however, is foreclosed, for such knowledge is presumed from the fact such person has been chosen as a juror. "'Obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they (jurors) are to find only the

minor premise but really a small bit of legislation ad hoc, like the standard of care." See Judge Learned Hand speaking in U.S. v. Levine, infra. The law presumes that a juror, if otherwise qualified to sit, has the requisite experience, drawn up instinctively from life and common speech, to aid in determining the acceptable mesne which most nearly satisfies the moral demands of a community. In U.S. v. Kennerley, 209 F.119 (SDNY 1913), Justice Learned Hand, often called the "architect" of modern obscenity law, had the following to say in this regard, at page 121:

> ". . . If there be no abstract definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present, critical point in compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. . . .
>
> "Nor is it an objection, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm

the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech." (Emphasis provided.)

In a later case, U.S. v. Levine, 83 F.2d 156, 157 (1936), cited in Roth-Alberts, 354 U.S. 476 at footnote 26, as consistent with the obscenity law expressed therein, Judge Hand called the verdict on "obscenity" a "small bit of legislation ad hoc, like the standard of care which the Constitution imposes on a jury as a 'duty'" at page 157:

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. United States, supra, 161 U.S. 29, 42, 16 S.Ct. 434, 480, 40 L.Ed. 606), because the standard

> they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they are to find only the minor premise but really a small bit of legislation ad hoc, like the standard of care." (Emphasis provided.)

While the petitioner's argument (Brief for Petitioner at page 41) takes issue with the opinion of the Court of Appeals below and that Court's analogy to the "reasonable man" rule (See Point 1 C, infra, at page 26), and would disagree with the above-stated analysis of Judge Learned Hand, the distinctions which are stated in petitioner's brief are without substance.

Petitioner's objection (Brief for Petitioner at page 3) that "the District Court allowed the jurors to legislate their own views of the community standards governing what is "obscene" in Iowa is not well taken. In the sense noted by Judge Hand above, that is exactly what the law requires them to do.

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/// /// ///

C. U. S. District Judge W. C. Stuart's Ruling Was Correct. There Was No Abuse of Discretion.

The voir dire examination ought not to be permitted to take an indefinitely wide range covering collateral or incidental matters having some connection with the case. 50 C. J. S. Juries § 275 at page 1041. For example, had this been a civil negligence lawsuit, it would not have been proper for the petitioner to ask the individual jurors specific questions regarding their knowledge of the standard of care for the negligent act which was at issue. See Point I(B), supra, at page 20. Amicus submits that the reasoning in U. S. District Judge W. C. Stuart's order denying the motion for a new trial (See Exhibit "A" to this brief at page A-2) was entirely correct when he stated:

> "A juror's role in cases of this character is revealed in the following passage from Hamling v. United States (1974), 418 U.S. 87, 105:
>
> > The result of the Miller cases, therefor, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in

> > obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person applying contemporary community standards' would reach in a given case.

A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence in this case as to what constitutes a contemporary community standard and how such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of 'reasonableness' be necessary where that standard is an essential element."

Such questions do not bear upon the juror's qualifications to serve, or place his bias in question. cf. U.S. v. Robinson, 154 App. D.C. 265, 475 F.2d 376. As explained by Court of Appeals Justice Tom C. Clark, in affirming the

trial court's ruling. (See Exhibit "B" to Amicus Curiae Brief at page B-2):

> "The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the 'reasonable' or 'average' person in other areas of decision making. Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are inborn and often undefinable.
>
> This is not to say that no questions can be asked the jury panel in this area, but only that the specific ones tendered here were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc."

The ruling of the trial judge was correct for yet another reason. Questions are improper which are calculated to give undue importance to any feature of the case. C.J.S. Juries § 275 at page 1042. It seems clear that the

questions which were posed by petitioner's trial council were designed to place before the jury the historical event and facts which supplied the foundation for the legal issue which was before the trial court; namely, the effect on the federal postal statute (criminal) of the failure of the state legislature to enact legislation,[5/] subsequent to this Court's decisions in Miller v. California et al., supra, which would criminalize conduct involving the distribution, etc., of obscene matter to adults within the State of Iowa. For the reasons stated hereinafter at Point II, the failure of the State Legislature to criminalize such conduct could have no effect on a trial in the federal district court involving the Federal Postal Crime, and therefore the question as posed by Petitioner's Council was improper.

D. Petitioner's Reliance On Aldridge v. U.S. And Ham v. South Carolina Is Misplaced. All That Is Required Is A General Inquiry Into The Juror's General Views Concerning Obscenity.

Petitioner's reliance on Aldridge v. U.S., 282 U.S. 308 (1931) and Ham v. South Carolina, 409 U.S. 524 (1973) (Brief for Petitioner at page

5/ See footnote 2 at page 15, supra.

39) in support of its proposition that such voir dire inquiry is mandated by "the essential fairness required by the Due Process Clause" is misplaced. The same argument was advanced in Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (June 24, 1974) where the Federal District Court refused to ask certain questions on voir dire concerning possible religious and other biases of the jurors; specifically whether the jurors' educational, political, and religious beliefs might affect their views on the questions of obscenity. In rejecting the need for more than a general inquiry into the jurors' general views concerning obscenity, this Court said in Hamling v. U.S. at 139:

> "We agree with the Court of Appeals. Fed. Rule Crim. Proc. 24(a) permits a district court to conduct the voir dire examination, making such use of questions submitted by the parties as it deems proper. The District Court here asked questions similar to many of those submitted by petitioners, and its examination was clearly sufficient to test the qualifications and competency of the prospective jurors. Petitioners' reliance on this Court's decisions in Aldridge v. United States, 283 U.S. 308, 75 L.Ed. 1054, 51 S.Ct.

470, 73 A.L.R. 1203 (1931), and Ham v. South Carolina, 409 U.S. 524, 35 L.Ed.2d 46, 93 S.Ct. 848 (1973), is misplaced. Those cases held that in certain situations a judge must inquire into possible racial prejudices of the jurors in order to satisfy the demands of due process. But in Ham v. South Carolina, supra, we also rejected a claim that the trial judge had erred in refusing to ask the jurors about potential bias against beards, noting our inability 'to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices . . . .' Id., at 528, 35 L.Ed.2d 46. Here, as in Ham, the trial judge made a general inquiry into the jurors' general views concerning obscenity. Failure to ask specific questions as to the possible effect of educational, political, and religious biases did 'not reach the level of a constitutional violation,' ibid., nor was it error requiring the exercise of our supervisory authority over the administration of justice in the federal courts. We hold that the District Court acted within its discretion in refusing to ask the questions." (Our emphasis.)

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II

THE FEDERAL DISTRICT COURT DID NOT ERR IN REFUSING TO APPLY CHAPTER 725 OF THE IOWA CODE TO A CRIMINAL PROSECUTION INVOLVING THE FEDERAL POSTAL STATUTE AND USE OF THE MAILS, 18 U.S.C. SECTION 1461, NOR DID SUCH REFUSAL RENDER THE FEDERAL STATUTE UNCONSTITUTIONALLY VAGUE.

A. The Application Of 18 U.S.C. Section 1461 To The Use Of The Mails For The Intrastate Shipment Of Obscene Materials Is A Proper Exercise Of Federal Power.

Article I, section 8, clause 7 delegates to the federal government the exclusive power "to establish post offices and post roads" and to regulate the use of the same for both inter and intrastate purposes. Unlike the commerce power over obscene materials, which extends only to interstate transportation, the federal controls over postal matters encompass intrastate mailings as well. In Public Clearing House v. Coyne, 194 U.S. 497 (May 3, 1904), the extent of the postal power was described as follows, at page 506-508:

> "The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion

> of the Court in Ex parte Jackson, 96 U.S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded, . . . In establishing such system Congress may . . . also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, . . . it may . . . also forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of . . . the dissemination among its citizens of information of a character calculated to debauch the public morality. For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. The same provision was by the same act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality

of which was upheld by this court in In re Rapier, 143 U.S. 110."

Ex Parte Jackson, 96 U.S. 727 (1877), which was referred to in Public Clearing House v. Coyne, supra, involved intrastate facts similar to those presented in the cause herein, except that the subject matter involved a lottery. There, an indictment was filed in the Circuit Court of the United States for the Southern District of New York, for knowingly and unlawfully depositing, on the 23rd of February 1877, at that district, in the mail of the United States, to be conveyed in it, a circular concerning a lottery offering prizes, enclosed in an envelope addressed to one J. Ketcham, at Gloversville, New York. A unanimous Court affirmed the conviction, holding at page 736:

"In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus, by the act of March 3, 1873, Congress declared 'that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or

any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things. . . . shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offence, be fined not less than $100, nor more than $5,000, or imprisonment at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge."

"All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and

articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries, -- institutions which are supposed to have a demoralizing influence upon the people. There is no question before us as to the evidence upon which the conviction of the petitioner was had; nor does it appear whether the envelope in which the prohibited circular was deposited in the mail was sealed or left open for examination. The only question for our determination relates to the constitutionality of the act; and of that we have no doubt."

B. Although Chapter 725 Of The Iowa Code Failed To Impose Criminal Sanctions At The State Level Against Conduct Involving The Dissemination Of Matter To Adults Which Would Be Obscene Under Federal Standards, The Entire Expression Of The Legislature Is Not Clear. Amicus Submits Such Legislation Did Not And Could Not Prevent Government From Criminalizing Such Conduct At The Local Level And/Or Taking Action To Abate The Same Civilly As A Public Nuisance, Nor Did It Render Such Subject Matter Acceptable To The Contemporary Community Standards.

1. The pre-emption provision of Chapter 725 of the Iowa Code is ambiguous.

An examination of Chapter 725 of the Iowa Code (see pages 4-8, supra) reveals that Chapter 725 (House File 1102), by its very language, purports to legislate only as to material which is "obscene to minors". Section 725.1 provides as follows:

"725.1. Definitions. As used in this section and sections 725.2 to 725.10, unless the content otherwise requires:

1. 'Obscene material' is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable for minors, would find appeals to the prurient interest and is patently offensive, and the material, taken as a whole lacks serious literary, scientific, political or artistic value." (Our emphasis).

The history of litigation in the minor's area demonstrates that the subject matter which is being regulated by Chapter 725, by definition, is not the same subject matter which was being

considered in Roth-Alberts, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957), but includes material which may have constitutional protection. Compare Butler v. Michigan, 352 U.S. 380, 1 L.Ed.2d 412, 77 S.Ct. 524 (Feb. 25, 1957). The constitutionality of that special type of legislation seems beyond doubt. See Sam Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (Apr. 22, 1968), where Justice Brennan in describing the nature of the case began his opinion as follows, at page 199:

> "This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults." (Our emphasis).

Compare Bookcase Inc. v. Broderick, 18 N.Y. 2d 71, 271 N.Y.S. 2d 947, appeal dismissed for want of a properly presented federal question, 385 U.S. 12 17 L.Ed.2d 11, 87 S.Ct. 81 (Oct. 10, 1966); New York v. Charles Tannenbaum, 18 N.Y. 2d 268, 274 N.Y.S. 2d 131, appeal dismissed as moot 388 U.S. 439, 18 L.Ed.2d 1300, 87 S.Ct. 2107 (June 12, 1967). Because of the inclusion

of subject matter which, under other circumstances, may be protected by the federal constitution in so far as distribution to adults is concerned, there is a logical reason for pre-emption to be exercised at the state level in relation to such subject matter.

Section 725.9, entitled "Uniform Application", (see page 7, supra) is clearly a pre-emptive provision but, in view of the definition section noted above, there is a serious question as to whether such preemption was meant to extend to anything beyond that class of materials which is "obscene to minors". See State of Washington v. J-R Distributing Inc., 82 Wash. 2d 584, 512 P.2d 1049, discussed hereinafter.

Had those who drafted the bill included an express pre-emption, with specific language, such as, "There shall be no regulation of material which is obscene to adults", it would be clear that the legislators who voted for the bill knew what they were voting for. Lacking such specific language, it is difficult to say just what each legislator had in mind, when he cast his vote, and whether he intended to vote on anything other than a minor's statute. It must be remembered that the Iowa Legislature did not voluntarily repeal the general obscenity statute - that was done by the Iowa Supreme

Court in State v. Wedelstedt, 213 N.W.2d 652 (Dec. 19, 1973), in reliance on this Court's decisions in Miller and Paris Adult Theatre I in June of 1973. (See footnote 2 at page 15, supra.)

2. Chapter 725 of the Iowa Code should be interpreted as not effecting an implied pre-emption, so as to avoid a constitutional confrontation.

In considering whether Chapter 725 of the Iowa Code does, in fact, come into collision with the Federal Postal Law, 18 U.S.C., section 1461, this Court must first decide whether section 725.9 must be construed in the manner urged by petitioner;[6/] namely, that section 725.9

6/ See Sutherland Statutory Construction, Vol. 2 § 37.04. "Interpretation of state statutes in the federal courts" at page 87:

> "But where the United States Constitution compels one interpretation to the exclusion of others of a state statute in order for it to be constitutional, federal courts will give it that interpretation on their own authority without awaiting a ruling by the state courts . . ."

The Binghamton Bridge, 3 Wall 70 U.S. 51, 18 L.Ed. 137 (1865), Illinois Central R. Co. v. Chicago, 176 U.S. 646, 44 L.Ed. 622, 20 S.Ct. 509 (1900); New York Rapid Transit Co. v. New York, 303 U.S. 573, 82 L.Ed. 1024, 58 S.Ct.

expresses an implied pre-emption, thereby setting a state public policy which legalized the traffic which was the subject of the federal indictment herein. On this issue, the decision by the Washington Supreme Court in State of Washington v. J-R Distributing Inc., 82 Wash.2d 548, 512 P.2d 1049 should be considered. In that case, involving the issue of repeal of general obscenity statute by implication (rather than pre-emption of general obscenity legislation by implication), that Court held that the criminal sanctions respecting adults, R.C.W.9.68.010, were not impliedly repealed[7/] by enactment of a

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721 (1938); Higgenbothan v. Baton Rouge, 306 U.S. 535, 83 L.Ed. 968, 59 S.Ct. 705 (1939), Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 87 L.Ed. 165, 63 S.Ct. 172 (1942); Commissioner of Internal Revenue v. Tower, 327 U.S. 280, 91 L.Ed. 670, 66 S.Ct. 532 (1946); New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 95 L.Ed. 439, 70 S.Ct. 413 (1950).

7/ The presumption against implied repeal is expressed in Sutherland Statutory Construction, volume 1A, § 23.10. "Presumption against implied repeal" at page 231, as:

> "The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, and, therefore, if a repeal of the prior law is intended, expressly to designate the offending provisions rather than to leave the repeal to

minor's statute with similar preemptive language. R.C.W.9.68.050-9.68.120. In that regard, the Washington Supreme Court held, at page 1062:

> "Defendant argues that R.C.W. 9.68.010 has been superseded and impliedly repealed by R.C.W. 9.68.050-120. He points out that R.C.W. 9.68.010 was last amended in Laws of 1969, ch. 92 § 1, p. 261, whereas R.C.W. 9.68.120 was adopted subsequently in Laws of 1969, 1st Ex.Sess., ch. 256,

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arise by necessary implication from the later enactment. Still more basic, however, is the assumption that existing statutory and common law, as well as ancient law, is representative of popular will. As traditional and customary rules, the presumption is against their alteration or repeal. The presumption has been said to have special application to important public statutes of long standing."

Rationally, the same presumption should exist as to the public policy in support of a public statute of long standing which has been held by a court decision to be technically defective on constitutional grounds. In a number of states where the state obscenity statute has been struck as a result of this Court's rulings in Miller and Paris Adult Theatre I, a road block has been thrown up in the state legislatures by the various lobbies, to prevent passage of a general obscenity statute. Amicus submits that it would indeed be unfortunate if such inaction, such as has occurred in the Iowa state legislature, could be construed to prevent the local communities from taking corrective legislative action.

§§ 13-20, p. 2093. This is said to indicate a legislative intent to repeal the earlier enactment by the more recent one, although both were enacted in 1969. Thus, defendant contends, R.C.W. 9.68.050-120 is the exclusive method of dealing with the exhibition of materials falling within its purview, including 'obscene' material. We disagree.

First, there is nothing in the legislation itself to indicate that R.C.W. 9.68.050-120 amends or repeals R.C.W. 9.68.010. Second, repeal by implication is not favored. Before a legislative enactment will be found to have been impliedly repealed by a subsequent act, the later legislation must clearly be intended to supersede the prior act. Copeland Lumber Co. v. Wilkins, 75 Wash.2d 940, 454 P.2d 821 (1969). Third, if there is to be an implied repeal, the implication must be clear and necessary and the two acts must be so inconsistent with and repugnant to each other that they are irreconcilable and cannot both be given effect. State v. Crow, 22 Wash.2d 402, 156 P.2d 416 (1945); Copeland Lumber Co. v. Wilkins, supra. Such is not the case here.

Clearly, R.C.W. 9.68.050-120 evidences no legislative intent to impliedly repeal R.C.W. 9.68.010. Different conduct, persons and categories of materials are covered in the two legislative enactments. R.C.W. 9.68.050-120 specifically applies only to minors whereas R.C.W. 9.68.010 has general application. R.C.W. 9.68.050-120 recognizes that there is a difference between materials which will appeal to a minor's prurient interest in sex and those which will have a similar appeal to adults (covered by R.C.W. 9.68.010). Application of the later enactment is not broadened by use of the language 'the provisions of R.C.W. 9.68.050 through 9.68.120 shall be exclusive.' R.C.W. 9.68.120. Such language means only that the definitions and procedures set forth in R.C.W. 9.68.050-120 are exclusive insofar as minors are concerned, and, that the state has preempted the field in the area of material defined as 'erotic' to minors. Thus, there is no repeal by implication here.'" (Our emphasis).

3. The pre-emption which Petitioner urges would be unlawful, as depriving the citizens of the local communities in Iowa of a federally protected right to live in a community whose public morals, moral values and environment are free from the degrading and corrupting influences of patently hard-core pornography.

(a) The judiciary has a moral responsibility as the guardian of the people's morals.

If the petitioner is correct in construing Chapter 725 as effecting a total pre-emption by making such materials acceptable to the contemporary community standards and precluding the local governments in Iowa from taking any action, either legislatively by way of local ordinances, or judicially through the initiation of civil lawsuits to prevent and abate traffic in hard-core pornography, then such legislation at the state level is invalid on federal grounds, as depriving the citizens of the State of Iowa, as citizens of the United States, of their federal rights. To recognize a "pre-emption" under the above circumstances would deprive the citizens of the

State of Iowa of:

(1) due process of law and equal protection of the law;

(2) the police power and "home rule" authority which is inherent in municipal authority; and

(3) one of the fundamental rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common decency" and to live in a community whose public morals, moral values and environment are free from the illegal, degrading and corrupting influences of such patently hard-core pornography.

It was long ago decided that the Courts in our Anglo-Saxon legal system are the guardians of the public morals. Rex v. Curl, 2 Strange 789 (1727) Sir Charles Sedley's case, 1 Sid 168. A state legislature may not restrain the governmental power to deal with vice. In Farmer v. Behmer, 100 P.901 at 904 the California Court of Appeals had the following to say in this regard:

> "It is a novel doctrine that the Legislature may empower a city by its charter to suspend the operation of general laws punishing crime. No one would for

a moment contend that murder, manslaughter, larceny, burglary, or any other of the long list of crimes punishable by statute could be condoned or palliated by an ordinance regulating or licensing such offenses. The heinousness or degree of the crime can make no difference. The statute punishing the keeping of a house of prostitution as a crime can no more be suspended in its operation than any other criminal statute. ..."

(b) Where commercial vice is involved, local government's power to abate the same is inherent, and plenary, and may not be interferred with.

> "The power to determine the question of what will injuriously affect the public is lodged with the legislative branch of the Government." Mugler v. Kansas, 123 U.S. 205 at 210 (Dec. 5, 1887).

A legislative act or judicial ruling which would restrict a municipality's police power to legislate on those matters considered necessary to safeguard public morality would constitute an unconstitutional abridgment of fundamental rights under the federal constitution. Mugler v. Kansas, 123 U.S. 205 at 210, 211. The argument

that petitioner makes (Brief for Petitioner at page 15) that this Court in Miller, by affirming the right of a State legislature to preclude localized community standards in favor of a state-wide standard, thereby "set a course specifically chartered by this Court", whereby the state legislature could mandate a standard that required the acceptance of hard-core pornography in every hamlet, village, and town, and foreclosed prohibitions by "other (local) government units within the state" carries that statement too far. See U.S. v. 12-200 Feet of Reels, 413 U.S. 123, 37 L.Ed.2d 500 at 505, 93 S.Ct. 2665, where this Court put a halt to just such an illogical extention:

> "The seductive plausability of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'

> Perspectives may change, but our conclusion is that Stanley represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, Stanley would not be the law today."

This Court has many times recognized that a legislative body may not bargain away its power to protect public morals, nor excuse its failure to perform a public duty by saying it had been agreed, by legislative enactment, not to do so. In Stone v. Mississippi, 101 U.S. 814, (1879), this Court said, at page 819:

> "The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation,

and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. Beer Company v. Massachusetts, supra."

In Douglas v. Kentucky, 168 U.S. 489 (1897), this Court again considered the public policy re public morals, above expressed in Stone v. Mississippi, supra; and therein commented, at page 505:

"In the same opinion it is well observed that, under any other doctrine than that announced in Stone v. Mississippi, the legislature, by giving or bartering away the power to guard and protect the public morals, could 'convert the State into dens of bawdy houses, gambling shops and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the State of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals and good order of the State would be cast to the winds, and vice and crime would triumph in their stead. Now, it seems to us that the

essential principles of self-preservation forbid that the Commonwealth should possess a power so revolting, because destructive of the main pillars of government.'"

See also Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 356, 47 L.Ed. 492 (1903) commented on hereinafter at page 61.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973) Memoirs v. Massachusetts, 383 U.S. 413, 462 (1966) (White, J., dissenting) and U.S. v. Reidel, 402 U.S. 351, 357 (1971), which are relied upon by Petitioner (Brief for Petitioner at page 15), cannot be read in a manner which would place them at odds with the above stated legal principles. (See page 64, infra). Whereas, it is true that a State Legislature may choose by inaction not to legislate in the criminal (morals) area, it may not, by that inaction, foreclose the right of a local government such as a city, from applying the above principles re the moral law to that subject matter which the universal judgment of mankind says "should be restrained." U.S. v. Roth, 354 U.S. 476, 1 L. Ed.2d 1498, 1507, 77 S.Ct. 1304.[8/] Although "a

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8/ See the opinion of the Montana Supreme Court in U.S. Manufacturing and Distributing Corp. v. City of Great Falls, 546 P.2d 522 at 526 (Feb. 25, 1976) which suggests that a local community has an inherent right to act in this area.

municipal ordinance draws its authority from enabling legislation, the withdrawal of the authoritative enactment by specific provision or by implication of subsequent legislation upon the subject matter operates to repeal any ordinance which was dependant upon the repealed statute for its existence," the rule is otherwise "where a power is exercised by a municipality which is either within the sphere of its statutory authority" (i.e. public nuisance) or is a fundamental matter of local concern. See Sutherland Statutory Construction, Volume 1A, section 23.19. "Conflict between local ordinances and state statutes" at page 253 and the cases therein cited. See also Hamling v. U.S., 418 U.S. 87 at 105.

The power, which is being attacked herein, is one of the most basic powers of local government - the power possessed by local government in aid of its duty to protect the public morals of the local community against that type of public conduct which is regarded as being malum in se. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Woods describes the danger as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H. G. Wood, Sections 23 and 24, at pages 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."

"Section 24. Wrongs malum in se. - This class of nuisances are of that aggravated class of wrongs that, being malum in se,

the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

That municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law rather than from "express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Woods, Section 743, at page 972:

"Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must

be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

Joyce, in his treatise "Law of Nuisance", Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance; at page 498:

"The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right,

but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution."

The importance of this municipal power was stressed by the United States Supreme Court in James Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . It is a principle of the common law, that the king cannot sanction a nuisance. . . ."

C. Assuming That Chapter 725 Of The Iowa Code Was Intended To Effect A Pre-emption Which Would Guarantee The Unrestricted Distribution To Adults In Iowa Of Hard-core Pornography Which Under Federal Law Would Be Obscene, Such Legislation Would Be Invalid Because In Direct Conflict With Federal Law.

1. Such legislative action would be invalid being in conflict with Article I, Section 10 of the federal constitution. The State of Iowa may not legislate to encourage the dissemination of subject matter which the United States of America, by treaty, is required to discourage.

In Roth v. U.S., 354 U.S. 476 at 484 (June 21, 1957) this Court took notice of an existing international policy agreement:

"But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations,9/ ..."

9/ A copy of the 1911 "Agreement for the Suppression of the Circulation of Obscene Publications", 37 Stat 1511-1515, referred to by the Roth Court at footnote 15 is attached as Exhibit "D" to this Brief Amicus Curiae. In that treaty, the United States of America, as a signatory nation, expressed the national desire to repress "offenses connected with obscene publications", and entered into a mutual compact with other nations to that end.

In Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1879), this Court noted that the treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. When the conflict is between the provision of a treaty and a provision of a state statute the treaty supercedes prior conflicting state legislation, and cannot be restricted by later inconsistent state statutes. Sutherland Statutory Construction, Vol 1A, Section 23.22. "Conflict between statutes and treaties" at page 262.

A treaty cannot be the Supreme law of the land, that is of all of the United States, if an act of a State Legislature can stand in its way. Ware v. Hylton, 3 Dall. 199 (1746).

2. Such legislative action would be invalid under the "one people" concept regarding the federal police power.

The trial judge's ruling, that a federal jury, in deciding a case involving federal standards of obscenity, could totally disregard state law on the subject, was not "inconsistent with basic principles of federalism" as claimed by petitioner. (See Brief for Petitioner at page 18). The "one people" concept of federalism,

(see Hoke v. U.S., 27 U.S. 308 (Feb. 24, 1913), envisions the federal government as having been granted plenary power to control the mails and interstate commerce, and charged with the concomitant duty and responsibility of administering those controls, which have been established by their representatives at the national level, in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one people" concept the federal government has total control over subject matter as to which reasonable minds would not differ and all would hold to be pornographic (hard-core pornography).

(a) The "one people" concept.

Petitioner's dispute (Brief for Petitioner at page 18) with the Court of Appeal ruling that:

> "the fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within the state approve of the permitted conduct."

and claim that the same is an "astounding statement" which "is repugnant to the political structure of a democratic republic", refuses to acknowledge the existence of the "one nation" concept which has been developed in aid of maintaining

good public morality. See Part XIV entitled "The 'One People' Concept,"[10/] appearing in "The Challenge of a Modern Federal Criminal Code Statement in the U. S. Senate by Senator John L. McClellan, March 11, 1971, in Hearings Before the

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10/ XIV. THE "ONE PEOPLE" CONCEPT. Between the Code of 1909 and the codification of 1948, a number of significant new Federal criminal offenses were enacted. Their significance can be best understood, however, by prefacing their consideration by a reference to Madison's conception of the scope of the powers of the Federal Government. In the Federalist No. 44, he observed:

The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce; with last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.

This limited conception of the role of the Federal Government stands in sharp contrast, of course, with what as a matter of history has come to pass. For example, in June, 1910, less than 6 months after the Code of 1909 went into effect, Congress passed the Mann Act, a provision against the "moral misuse" of the facilities of interstate commerce. (Act of June 25, 1910, c. 395, 36 Stat. 825.) In Hoke v. United States, 277 U.S. 308, 322 (1913), upholding the act, Mr. Justice McKenna employed expressions which, when considered, serve as a reminder that,

Subcommittee on Criminal Law and Procedures of the Committee on the Judiciary, United States Senate, Ninety-second Congress, First Session, Part 1," at p. 30. In Congress, the

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since 1872, Congress had been acting, intermittently, upon a principle foreign to Madison's that did not come into application until after the Civil War. He said:

"Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people . . . and the powers (granted to the Federal government) . . . are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."

The inference is plain. Lotteries, frauds, circulation of obscene literature, prostitution, narcotic addiction, all were, at first, well within what Madison had in mind when he commented that the powers reserved to the States extended to "all objects which, in the ordinary course of affairs, concern . . . the internal order, improvement, and prosperity of the state." The trouble was that it proved, as we became not only one people, but one nation, impossible for the States, under their own powers, effectually to preserve "internal order" in these matters when the facilities of the mails were seen to operate, in one fashion, and the privileges of interstate commerce, in another, to negate the efforts of any state to suppress what the people of the nation saw as national evils. In the judgment of many, these evils were pervasive throughout the whole nation. There were, moreover, Federal constitutional powers under which they could be attacked by the enactment of federal criminal legislation. From time to time, therefore, Congress made use of the powers assigned to the general government, singly or in combination, "to promote the general welfare, material and moral."

several states have assembled and established a comprehensive set of federal controls of obscenity over (1) importation from abroad, (2) use of the mails, (3) transportation in interstate commerce, and (4) international movement. In view of such federal legislation, it is difficult to understand petitioner's claim, (Brief for Petitioner at page 21) that the Iowa legislature has "conclusively determined the contemporary community standards." Amicus submits that such an argument gives the legislative action greater weight than it is entitled to under the "one people" concept of federalism.[11/]

11/ Further, Iowa law would not have the effect of "establishing" the contemporary community standards. (Brief for Petitioner at p.14.) Even though the decriminalization of dealing in obscenity might exist, the relevancy of Chapter 725 would still be in question where the State judiciary has not as yet answered the further question as to whether the state civil public nuisance statute can be implemented by local ordinances to allow civil abatement controls in this area. See Iowa ex rel. Faches v. N.D.D. Inc. d.b.a. Marion Adult Theater, 228 N.W.2d 191 (Apr. 16, 1973), discussed at footnote 2 on page 15 herein, and compare People ex rel. Busch et al. v. Projection Room Theater et al., 16 Cal. 3d 360, 546 P.2d 733, 128 Cal. Rptr. 229, vacated and new opinions substituted in 17 Cal.3d 42, 550 P.2d 600, 130 Cal.Rptr. 328 (June 1, 1976), petition for certiorari filed on Aug. 30, 1976 in Van de Kamp v. Projection Room Theater, No. 76-390 October Term 1976

Contrary to petitioner's arguments (Brief for Petitioner at pp. 17 and 24), obscenity is not "predominantly a matter of state interest." It is, under the "one people" concept, a matter of state and federal interest. Independent federal interests have been "identified" by this Court in the well-documented views of Justice Harlan. See, for example, Roth v. U. S., 354 U.S. at 497-498. Amicus submits that the foundation for Harlan's views are to be found in the "one people" concept. In granting such powers to the Federal government, it was the expectation of the compact States that the Federal government would administer those powers to suppress that subject matter which was considered by the States as a whole to be injurious to public morals, as declared by their representatives in federal legislation. See Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903), where the court said at pp.

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with Pennsylvania v. MacDonald, 347 A.2d 290, petition for certiorari denied by this Court in 75-1073 on Oct. 4, 1976. Were this court to so hold, would preclude local government from making the argument--as yet unanswered--that a local community has a Federal right to keep hard-core pornography out of the neighborhood. The petitioner's argument that state law precludes any finding that the materials are "obscene" would necessitate a holding that the state legislature can pre-empt Federal law. (See Point IIC3 at page 65 infra.)

356 and 357:

"If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution . . . . But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals . . . As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people

of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them — which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end . . . ." (Our emphasis.)

In enumerating his hard-core pornography rule limitation on federal power, Harlan was using as a common denominator that "bottom of the barrel" quality of material as to which it

might be said that reasonable minds would not differ, and could come to but one conclusion.[12/]

In Miller v. California et al., supra, this Court's obscenity decisions took a sharp turn in course from the direction in which they had been proceeding. Over night, all of the hurdles which had been constructed against law enforcement were removed and the pornographers awoke on June 21, 1973, to find themselves stripped of their defenses. In spite of the braking action which this Court has applied, the expected positive gains have not been achieved. Nor will they, until the conspicuous contradiction in those decisions is corrected.[13/]

12/ Conceptually speaking, obscenity might be visualized as a polluted liquid of varying densities contained within a barrel, with hard-core pornography, with the heaviest density, lying at the bottom of the barrel. Protected free speech can be visualized as that clear liquid which overflows and lies outside the barrel. That subject matter which lies inside the barrel and on top of the density layer which is "hard-core pornography" is non-protected subject matter, which states may legalize or proscribe in their discretion.

13/ This Court said in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628, June 21, 1973:

> "The States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. . . ."

Surely this Court was not saying that hard-core pornography, which under federal law may not be imported; may not be placed in the mail, may have no property value, may not be copyrighted and which may not be sent interstate, can nevertheless be given a legal status and value within a state? What of the expression in Roth-Alberts, 354 U.S. 476, 485, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) that it is the universal judgment of civilized nations as reflected in their international agreements, that obscenity should be restrained? Should not this Court explain that statement by recognizing the Harlan view expressed in Roth v. U.S., 354 U.S. 476, at 500, and admitting that what the court was talking about, in so far as States are concerned, was something which was specifically described, but less than hard-core pornography (reasonable men would not differ and could come to but one conclusion), and yet not quite protected speech.

3. Such legislative action would be invalid under the Supremacy Clause. On the question of whether hard-core pornography is to be tolerated, federal law has occupied the field.

When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23 (1824). Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-230, 11

L.Ed. 1447, 67 S.Ct. 1146, 1151, 1152 (1947).

(a) The disposition of "hard-core pornography" inherently, is a matter for federal control:

In Congress assembled, the representatives of the several states have established a comprehensive set of federal controls on obscenity over (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. See 18 U.S.C. Sections 1461-1465, 1735, 1737; 19 U.S.C. Section 1305. Those controls have been supplemented by treaty abroad. In a situation such as this, where the evidence clearly points to a total restraint on such hard-core pornography, the federal compact must prevail and preemption is clearly operative. While Congress has never established a definition of obscenity, it has not, as noted above, been silent about whether or not obscenity should be proscribed, cf. Justice Harlan's discussion of the category of obscenity, "hard-core pornography", and federal power in relation thereto, cited with approval in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607. As regards the category "hard-core pornography", see Justice Douglas speaking on pre-

emption in Campbell v. Hussey, 368 U.S. 297, 7 L.Ed.2d 299, 82 S.Ct. 327 at 301:

> "We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of pre-emption. Under the federal law there can be but one 'official' standard - one that is 'uniform' and that eliminates all confusion by classifying tobacco not by geographical origin but by its characteristics. In other words, our view is that Congress, in legislating concerning the types of tobacco sold at auction, pre-empted the field and left no room for any supplementary state regulation concerning those same types."

(b) The Congressional intent has been clearly stated that obscenity shall not be given a free reign.

Petitioners contention that Iowa state law, liberating obscenity, should be adopted because of the "silence of Congress". (See Brief for Petitioner at page 27) is completely unsupported by the factual evidence, and flies in the face of the Congressional finding of fact and declaration of policy in that body's Act of Oct. 3,

1967, Public Law 90-100 81 Stat. 253 (creating the Commission on Obscenity and Pornography) which held that the traffic in obscenity and pornography is a matter of national concern.

See Section 1 of Public Law 90-100 which provided:

> "Section 1. Finding of fact and declaration of policy. - The Congress finds that the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials. The State and local governments have an equal responsibility in the exercise of their regulatory powers and any attempts to control this transmission should be a coordinated effort at the various governmental levels. It is the purpose of this Act (this note) to establish an advisory commission whose purpose shall be, after a thorough study which shall include a study of the causal relationship of such materials to antisocial

> behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography."

See also, Senate Resolution No. 477, rejecting the findings and recommendations of the Commission on Obscenity and Pornography, which recommended the liberation of obscenity. (Congressional Record for October 13, 1970 at pages 36474-36478). The Petitioner's argument also runs contrary to this Court's recent clarification in Hamling v. U.S., 41 L.Ed.2d at 618 which delineated what Congress has proscribed by 18 U.S.C. Section 1461.

Contrary to Petitioner's argument (Brief for Petitioner at page 24), this court has not indicated, with regard to competing interests, that it recognized that the regulation of "obscenity" is predominantly a matter of state, not federal interest. In those cases cited by Petitioner at page 24, this court was addressing itself to the opposing interests of the Tenth Amendment to the Federal Constitution (which reserves to states the power to regulate obscenity) and the First Amendment (freedom of speech which traditionally resists such regulation.) The argument (Brief for Petitioner at page 31) that "this Court has rejected any

need for national uniformity" does not place this Court's remarks in their proper context. The solution therein arrived at was in response to the problem of how to find an accomodation between the opposing interests of the Tenth Amendment (state police power) and the First Amendment (free speech). That accommodation does not dispute or deny the national need to provide controls which aid in the individual state efforts to suppress obscenity. Amicus submits that this national need for uniformity can be met by regulating and proscribing at the national level that which lies at the bottom of the barrel (Harlan's view) as described in the Miller formulation and incorporated into 18 U.S.C. Section 1461 by Hamling v. U.S. (See Point IIC2(a) at page 57 supra.)

Petitioner argues at pages 16 and 17 of his brief that, (1) "the test does not vary between federal and state prosecutions", and at page 17 that (2) "the same 'contemporary community standards' should be applied in Federal as well as state prosecution". If those two principles must exist side by side, then it must necessarily follow that one or the other must control since one legislative standard (federal) criminalizes traffic in such matters whereas, the other (state) does

not.

The principle which petitioner urges that an individual should receive uniform treatment in the state of his residence and that the same act should not be governed by two different standards, (Brief for Petitioner at page 32) must be analyzed in its proper context. What petitioner seeks is an assurance that, while voluntarily engaging in a game of Russian Roulette, he will not be done in by a lethal bullet. The law does not give him that assurance. Nash v. U.S. 229 U.S. 373; U.S. v. Hamling, 418 U.S. at 124. So long as Petitioner operates in the mud, he is not entitled to the same considerations as those who reach for the stars. U.S. v. Raines, 362 U.S. 17.[14/] If, as Petitioner claims, the law is to be that the same act should not be governed

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14/ A distributor is subject to varying degrees of criminal liability in prosecutions by various states under the several obscenity statutes. He is also subject to varying degrees of criminal liability in prosecutions in various federal judicial districts. Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 614, 94 S.Ct. 2887 (June 24, 1974). Different juries may reach different results. It should do no violence to constitutional principles that a distributor may be subjected to criminal prosecution in the federal jurisdiction and not in the state system for the same geographical area, where the range of his conduct places him at the bottom of the barrel. See footnote 12 at page 64 supra.

by two different standards—one state and one federal—then the only answer under these circumstances must be that the state standard must give way. There is, however, a strong argument that there must be two standards of review, if Harlan's view is to be followed (See Point IIC2 at page 61 supra and footnote 12 on page 64.)

If there is a "potential conflict" between Iowa's decision to decriminalize (not, deregulate) the distribution of sexually related material within its borders and a prosecution under 18 U.S.C. Section 1461 for an intrastate mailing (See Brief for Petitioner at page 23), such cannot be "reconciled" by "deference" to Iowa law. That analysis would fly in the face of the common understanding in Constitutional law that the grant of federal power in the postal area is specific and plenary, and is excluded from control through the Tenth Amendment, being a power which is delegated to the United States. To accord that construction would not bring about a "reconciliation" or "flesh out the details", but rather would run contrary to the specific authorization of the Tenth Amendment, and frustrate the intent of a comprehensive pattern of federal legislation.

In sum, the bent of the federal law is

to proscribe hard-core pornography. Petitioner's argument at page 28 of his brief, that to disregard Chapter 725 of the Iowa Code is to nullify state law without (1) a clear statement of Congressional intent or (2) an inherently federal subject matter, is without merit. The complete answer to the former contentions is found in Public Law No. 90-100 and the enactment of a comprehensive pattern of federal obscenity statutes. The answer to the latter can be found in the "one people" concept relating to the nature of the federal police power. (See Point II C2 supra, at page 56).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: October 15, 1976

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this __th day of October, 1976, copies of the within Brief Amicus Curiae of Citizens for Decency Through Law, Inc., an Ohio Corporation, in Support of Respondent United States of America were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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EXHIBIT A

Order (unreported) of U.S. District Judge W.C. Stuart, Southern District of Iowa, denying motion for new trial in

Reference: See Brief Amicus Curiae at pp. 1,16

IN THE UNITED STATES DISTRICT COURT,
Southern District of Iowa,

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JERRY LEE SMITH, d/b/a Intrigue,
Defendant.

Criminal No. 75-46.

ORDER.

On September 9, 1975, a federal jury found defendant Jerry Lee Smith d/b/a Intrigue guilty on seven counts of mailing obscene material in violation of 18 U. S. C. § 1461. The Court now has before it Mr. Smith's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure providing that a new trial may be granted "if required in the interest of justice". The Court however believes that the interest of justice does not so require in this situation, and the motion will be denied.

Defendant's motion is grounded upon the assertion that the Government has failed to sustain its burden of proof to show that the materials involved affronted contemporary community standards. Several reasons are given why this is claimed to be true. First, the Court's refusal to query, or allow counsel to query, prospective jurors as to their knowledge of any such standards, second, the absence of any evidence by the Government purporting to show what the proper standard is; and third, the Government's failure to show any violation of what defendant claims to be the binding standard in this regard—Chapter 725 of the Iowa Code. Defendant also argues that if the standards for the jurisdiction of this court are in fact different from the standard supposedly set forth in Chapter 725 of the Iowa Code,

a guilty verdict offends due process in that jurors were not questioned on the subject before being impaneled.

The Court will first consider the ramifications on this entire matter of the State of Iowa's decision not to regulate obscenity insofar as adults are concerned. Defendant implies that the contemporary community standard has thus been fixed and as such should be deemed controlling for purposes of a federal obscenity prosecution. Such an argument, however, assumes too much. We are dealing with a federal law which neither incorporates nor depends upon the laws of the states. *United States* v. *Hill* (5th Cir., 1974), 500 F. 2d 733. Although the Iowa legislature has chosen as a matter of policy to deregulate the dissemination of obscene materials, except where minors are involved, the federal government has not followed a similar course. Regardless of the state laws, federal proscriptions still remain upon the mailing of obscene materials. In an effort to formulate a workable definition of obscenity for use in federal prosecutions, a "contemporary community standard" has been included as an element thereof, but it does not inexorably follow that such standards are determined by what a state legislature has elected to tolerate. The fact that a state has chosen to permit a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the jury. (See the unpublished opinion of *United States* v. *Danley* (9th Cir., 1975), No. 75-1948.) Therefore, any arguments being advanced which are premised upon the controlling nature of the Iowa law in a federal prosecution must fail.

The Court is also unable to agree that the failure to elicit or have elicited from prospective jurors the extent of their knowledge of a contemporary community standard violated any of defendant's rights. A juror's role in cases of this character is revealed in the following passage from *Hamling* v. *United States*, (1974), 418 U. S. 87, 105:

> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is

> to permit a juror sitting in obscenity cases to draw on knowledge of the community of vicinage from which he comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence in this case as to what constitutes a contemporary community standard and how such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of "reasonableness" be necessary where that standard is an essential element.

Lastly, the Court cannot agree that the Government need introduce evidence of a community standard to sustain its burden of proof. As the Supreme Court has stated, "in the cases in which this Court has decided obscenity questions since *Roth* [*Roth* v. *United States*, 354 U. S. 476], it has regarded the materials as sufficient in themselves for the determination of the question". *Ginzburg* v. *United States* (1966), 383 U. S. 463, 465. The materials introduced by the Government in the trial of this case can and do speak for themselves. See also, *United States* v. *Manarite* (2d Cir., 1971), 448 F. 2d 583 and *United States* v. *Wild* (2d Cir., 1970), 422 F. 2d 34.

In view of the foregoing analysis, It is Hereby Ordered that the motion of defendant Jerry Lee Smith d/b/a Intrigue for new trial be denied.

Signed this 14 day of October, 1975.

/s/ W. C. STUART,
W. C. Stuart,
U. S. District Judge Southern District of Iowa.

EXHIBIT B

Per curiam opinion of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of conviction in JERRY LEE SMITH v. U.S. . . . . B-1 through B-3

Reference: See Brief Amicus Curiae at pp. 1, 17.

UNITED STATES COURT OF APPEALS,
For the Eighth Circuit.

No. 75-1802.

JERRY LEE SMITH, d/b/a INTRIGUE, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

} Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 15, 1976
Filed: February 13, 1976

Before CLARK, *Associate Justice,* Retired,* BRIGHT and HENLEY, *Circuit Judges.*

PER CURIAM:

Jerry Lee Smith was convicted in the United States District Court for the Southern District of Iowa on seven counts of placing non-mailable matter in the United States mails in violation of 18 U. S. C. §§ 1461-2 and was sentenced to three years imprisonment on each count to run concurrently, all of which was suspended except for six months. On this appeal

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

Smith asserts two errors by the trial court: (1) In refusing to ask or permit counsel to ask certain questions of the jury panel as to the contemporary community standards existing in the Southern District of Iowa relative to the depiction of sex and nudity in magazines and books; and (2) in not applying Iowa law in the determination of the contemporary community standards applicable to the case.

1. The questions that Smith wished propounded to the jury panel have to do with the juror's knowledge of the contemporary community standards existing in the Southern District of Iowa; where he acquired such information; his understanding of what the contemporary community standards are; if, in arriving at such understanding, he took into consideration the laws of the State of Iowa regulating obscenity; and finally, what is his understanding of those laws.

In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a "right to inquire of the juror what 'contemporary community standards' the juror has knowledge of, if any, and just which of the multiple 'contemporary community standards' the juror will apply to him, and the nature of the 'contemporary community standards' which the juror believes have application to him." But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is "one of law * * * a legal term of art," *Hamling* v. *United States*, 418 U. S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the "reasonable" or

"average" person in other areas of decision making. Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are inborn and often undefinable.

This is not to say that no questions can be asked the jury panel in this area, but only that the specific ones tendered here were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc.

2. This case appears to be controlled by *United States* v. *Danley*, 523 F. 2d 369 (9th Cir. 1975), and *United States* v. *Hill*, 500 F. 2d 733 (5th Cir. 1974); and the Supreme Court of the United States has passed on the second question in *Hamling* v. *United States*, 418 U. S. 87 (1974), where the Chief Justice wrote:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.

This prosecution deals with a federal statute and state law has no bearing on its decision. On the contrary, the federal statute depends on federal law as laid down by the Supreme Court. It has incorporated contemporary community standards in the determination of obscenity. In this connection we note that the trial court admitted into evidence a copy of Iowa's obscenity statute. This was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do. We are bound by the jury decision.

AFFIRMED.

EXHIBIT C

Newsarticle of Des Moines, Iowa "Register", dated May 21, 1976, reporting on action of conference committee striking the controls which were to be imposed upon the sale of pornographic materials to adults from the proposed revision of the Iowa Criminal Laws. C-1

Reference: See Brief Amicus Curiae at pp. 15-16, fn.2

CURBS ON SALE OF PORNOGRAPHY ARE VOTED DOWN

By JOHN HYDE
Register Staff Writer

Control over the sale of pornographic materials to adults was scratched from the proposed revisions of Iowa's criminal laws late Thursday night by a conference committee of the Iowa Legislature.

The committee took the action despite votes in both the House and Senate favoring some type of control of pornographic materials in Iowa.

Although conference committee reports traditionally are not amended by the full House or Senate, the committee's action is certain to spark controversy when the criminal code is debated next week in the Senate and House.

"In a Free Society..."

Senator Gene Glenn (Dem., Ottumwa) argued strongly against reviving obscenity laws for adults in Iowa, saying, "In a free society, it is my strong belief that an individual should be able to read what he chooses to read and see what he chooses to see."

Glenn said standards for the control of obscenity would rest on "subjective judgment," and he added, "those who would today say that I may now view hard-core pornography because it is immoral would tomorrow say that I may not view soft-core pornography because it is immoral.

"Therein is the ultimate danger of legislation in this area," he said.

The House has passed, with only seven dissenting votes, an amendment banning the sale or display of materials depicting sado-masochism, bestiality, child molestation and excretory functions.

"We have to recognize that there is very strong public opinion in the State of Iowa that there should be some restriction on the very hard-core pornography," said Representative Terry Branstad (Rep., Lake Mills).

Fears Influence

Branstad expressed concern that persons seeing or reading such pornographic materials might be influenced to engage in such acts.

"You'd have to convice me that the people who attend these movies or see these things were unaware that they exist," responded Representative Brice Oakley (Rep., Clinton).

Oakley noted that the Legislature had not acted to prevent consenting adults from participating in whatever sexual activities they wish, but the proposed obscenity law would prohibit their looking at pictures of such acts.

And Representative Norman Jesse (Dem., Des Moines) said the fear that criminal behavior would result from pornography is based on "false assumptions."

He cited statistics showing that the number of sex crimes in Denmark dropped markedly after censorship was relaxed in that country.

The Senate refused to adopt the House-passed amendment, but it did adopt an amendment prohibiting the general display of similar types of materials.

The Senate amendment, although technically flawed, would have limited the sale of certain types of pornographic materials to adult bookstores and movie houses.

The House-Senate conference committee rejected the Senate version, 8 to 2, and the House version, 6 to 4.

Attempts Modification

Branstad then attempted to modify the House amendment to allow local governments to establish obscenity controls, but that received only three votes.

"Whatever we do or do not do, we ought not to have a hodge-podge of 900-some communities and 99 counties establishing their own standards," said Jesse.

On the motion of Des Moines Republican Julia Gentleman, the committee voted to return to the language contained in the original criminal code bill before it was amended by the House or Senate.

The original bill, like Iowa's current obscenity law, prohibits the sale of pornographic materials to minors, but it allows adults to buy or see whatever they choose.

EXHIBIT D

Reference: Roth-Alberts, 354 U.S. 485, fn.15
Brief Amicus Curiae at p. 55, fn.9

Arrangement between the United States and other Powers relative to the repression of the circulation of obscene publications. Signed at Paris, May 4, 1910; ratification advised by the Senate, January 18, 1911; ratified by the President, February 4, 1911; ratification of the United States deposited with the Government of the French Republic March 15, 1911; proclaimed, April 18, 1911.

May 4, 1910.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Repression of obscene publications. Preamble.

Whereas an Arrangement between the United States of America and Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, France, Great Britain, Italy, The Netherlands, Portugal, Russia, and Switzerland relative to the suppression of the circulation of obscene publications, was concluded and signed by their respective Plenipotentiaries at Paris, on the fourth day of May, one thousand nine hundred and ten, the original of which Arrangement, being in the French language, is word for word as follows:

[Translation.]

ARRANGEMENT RELATIF À LA RÉPRESSION DE LA CIRCULATION DES PUBLICATIONS OBSCÈNES.	ARRANGEMENT RELATIVE TO THE REPRESSION OF THE CIRCULATION OF OBSCENE PUBLICATIONS.
Les Gouvernements des Puissances désignées ci-après, également désireux de faciliter, dans la mesure de leurs législations respectives, la communication mutuelle de renseignements en vue de la recherche et de la répression des délits relatifs aux Publications obscènes, ont résolu de conclure un Arrangement à cet effet et ont, en conséquence, désigné leurs Plénipotentiaires qui se sont réunis en Conférence, à Paris, du 18 avril au 4 mai 1910, et sont convenus des dispositions suivantes:	Contracting Powers. The Governments of the Powers hereinbelow named, equally desirous of facilitating within the scope of their respective legislation, the mutual interchange of information with a view to tracing and repressing offences connected with obscene publications, have resolved to conclude an arrangement to that end and have, in consequence, designated their plenipotentiaries who met in conference at Paris from April 18 to May 4, 1910, and agreed on the following provisions:
ARTICLE PREMIER.	ARTICLE 1.
Chacun des Gouvernements contractants s'engage à établir ou à désigner une autorité chargée:	Authority to be established. Each one of the Contracting Powers undertakes to establish or designate an authority charged with the duty of
1° De centraliser tous les renseignements pouvant faciliter la recherche et la répression des actes constituant des infractions à leur législation interne en matière d'écrits, dessins, images ou objets	Duties. (1) Centralizing all information which may facilitate the tracing and repressing of acts constituting infringements of their municipal law as to obscene writings, drawings, pictures or articles, and

obscènes, et dont les éléments constitutifs ont un caractère international;

2° De fournir tous renseignements susceptibles de mettre obstacle à l'importation des publications ou objets visés au paragraphe précédent comme aussi d'en assurer ou d'en accélérer la saisie, le tout dans les limites de la législation interne;

3° De communiquer les lois qui auraient déjà été rendues ou qui viendraient à l'être dans leurs États, relativement à l'objet du présent Arrangement.

Notification to contracting Governments.

Les Gouvernements contractants se feront connaître mutuellement, par l'entremise du Gouvernement de la République française, l'autorité établie ou désignée conformément au présent article.

ART. 2.

Direct correspondence.

L'autorité désignée à l'article 1er aura la faculté de correspondre directement avec le service similaire établi dans chacun des autres États contractants.

ART. 3.

Communication of bulletins.

L'autorité désignée à l'article 1er sera tenue, si la législation intérieure de son pays ne s'y oppose pas, de communiquer les bulletins des condamnations prononcées dans ledit pays aux autorités similaires de tous les autres États contractants, lorsqu'il s'agira d'infractions visées par l'article 1er.

ART. 4.

Adhesion of other Powers.

Les États non signataires sont admis à adhérer au présent Arrangement. Ils notifieront leur intention à cet effet par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera, en même temps, de la date du dépôt.

the constitutive elements of which bear an international character.

(2) Supplying all information tending to check the importation of publications or articles referred to in the foregoing paragraph and also to insure or expedite their seizure all within the scope of municipal legislation.

(3) Communicating the laws that have already been or may subsequently be enacted in their respective States in regard to the object of the present Arrangement.

The Contracting Governments shall mutually make known to one another, through the Government of the French Republic, the authority established or designated in accordance with the present Article.

ARTICLE II.

The authority designated in Article I shall be empowered to correspond directly with the like service established in each one of the other Contracting States.

ARTICLE III.

The authority designated in Article I shall be bound, if there be nothing to the contrary in the municipal law of its country, to communicate bulletins of the sentences passed in the said country to the similar authorities of all the other Contracting States in cases of offences coming under Article I.

ARTICLE IV.

Non-Signatory States will be permitted to adhere to the present Arrangement. They shall notify their intention to that effect by means of an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through diplomatic channel a certified copy of the said instrument to each one of the Contracting States and shall at the same time apprize them of the date of deposit.

Six mois après cette date, l'Arrangement entrera en vigueur dans l'ensemble du territoire de l'État adhérent, qui deviendra ainsi État contractant.

ART. 5.

Le présent Arrangement entrera en vigueur six mois après la date du dépôt des ratifications.

Dans le cas où l'un des États contractants le dénoncerait, cette dénonciation n'aurait d'effet qu'à l'égard de cet État.

La dénonciation sera notifiée par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera en même temps de la date du dépôt.

Douze mois après cette date, l'Arrangement cessera d'être en vigueur dans l'ensemble du territoire de l'État qui l'aura dénoncé.

ART. 6.

Le présent Arrangement sera ratifié, et les ratifications en seront déposées à Paris dès que six des États contractants seront en mesure de le faire.

Il sera dressé de tout dépôt de ratifications un procès-verbal, dont une copie, certifiée conforme, sera remise, par la voie diplomatique, à chacun des États contractants.

ART. 7.

Si un État contractant désire la mise en vigueur du présent Arrangement dans une ou plusieurs de ses colonies, possessions ou circonscriptions consulaires judiciaires, il notifiera son intention à cet effet par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera, en même temps, de la date du dépôt.

Six months after that date the Arrangement will go into effect throughout the territory of the adhering State which will thereby become a Contracting State.

ARTICLE V.

Effect.

The present Arrangement shall take effect six months after the date of deposit of the ratifications.

Denunciation by one Power.

In the event of one of the Contracting States denouncing it, the denunciation would only have effect in regard to that State.

The denunciation shall be notified by an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through the diplomatic channel a certified copy thereof to each one of the Contracting States and at the same time apprize them of the date of deposit.

Twelve months after that date the Arrangement shall cease to be in force throughout the territory of the denouncing State.

ARTICLE VI.

Ratification.

The present Arrangement shall be ratified and the ratifications shall be deposited at Paris as soon as six of the Contracting States shall be in position to do so.

A procès verbal of every deposit of ratifications shall be drawn up and a certified copy thereof shall be delivered through the diplomatic channel to each one of the Contracting States.

ARTICLE VII.

Enforcement in colonies, etc.

Should a Contracting State wish to enforce the present Arrangement in one or more of its colonies, possessions or consular court districts, it shall notify its intention to that effect by an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through the diplomatic channel a certified copy to each one of the Contracting States and at the same time apprize it of the date of the deposit.

Six mois après cette date, l'Arrangement entrera en vigueur dans les colonies, possessions ou circonscriptions consulaires judiciaires visées dans l'acte de notification.

La dénonciation de l'Arrangement par un des États contractants pour une ou plusieurs de ses colonies, possessions ou circonscriptions consulaires judiciaires s'effectuera dans les formes et conditions déterminées à l'alinéa 1er du présent article. Elle portera effet douze mois après la date du dépôt de l'acte de dénonciation dans les archives du Gouvernement de la République française.

Six months after that date the Arrangement shall go into effect in the colonies, possessions or consular court districts specified in the instrument of notification.

The denunciation of the Arrangement by one of the Contracting States in behalf of one or more of its colonies, possessions or consular court districts will be effected in the form and under the conditions set forth in the first paragraph of this Article. It will become operative twelve months after the date of the deposit of the instrument of denunciation in the archives of the Government of the French Republic.

ART. 8.

ARTICLE VIII.

Date of signature.

Le présent Arrangement, qui portera la date du 4 mai 1910, pourra être signé à Paris, jusqu'au 31 juillet suivant, par les Plénipotentiaires des Puissances représentées à la Conférence relative à la répression de la circulation des Publications obscènes.

Fait à Paris, le quatre mai mil neuf cent-dix, en un seul exemplaire, dont une copie conforme sera délivrée à chacun des Gouvernements signataires.

The present Arrangement which will bear date of May 4, 1910, may be signed at Paris until the following 31st of July by the Plenipotentiaries of the Powers represented at the Conference relative to the repression of the circulation of obscene publications.

Done at Paris, the fourth day of May one thousand nine hundred and ten in a single copy of which a certified copy shall be delivered to each one of the signatory Powers.

Pour l'Allemagne:
Signé:
(L. S.) ALBRECHT LENTZE.
(L. S.) CURT JOËL.

For Germany:
Signed
(L. S.) ALBRECHT LEUTZE.
(L. S.) CURT JOEL.

Pour l'Autriche et pour la Hongrie:
Signé:
(L. S.) A. NEMES,
Chargé d'Affaires d'Autriche-Hongrie.

For Austria and Hungary:
Signed
(L. S.) A. NEMES,
Chargé d'Affaires of Austria-Hungary.

Pour l'Autriche:
Signé:
(L. S.) J. EICHHOFF,
Conseiller de Section Imperial Royal autrichien.

For Austria:
Signed
(L. S.) J. EICHHOFF,
Austrian Imperial and Royal Section Counselor.

Pour la Hongrie:
Signé:
(L. S.) G. LERS,
Conseiller ministeriel Royal hongrois.

For Hungary:
Signed
(L. S.) G. LERS,
Hungarian Royal Ministerial Counselor.

Pour la Belgique:
Signé:
(L. S.) JULES LEJEUNE.
(L. S.) ISIDORE MAUS.

For Belgium:
Signed
(L. S.) JULES LEJEUNE.
(L. S.) ISIDORE MAUS.

Pour le Brésil:
Signé:
(L. S.) J.C. DE SOUZA BANDEIRA.

For Brazil:
Signed
(L. S.) J.C. DE SOUZA BANDEIRA.

Pour le Danemark:
Signé:
(L. S.) C. E. COLD.

For Denmark:
Signed
(L. S.) C. E. COLD.

Pour l'Espagne:
Signé:
(L. S.) OCTAVIO CUARTERO.

For Spain:
Signed
(L. S.) OCTAVIO CUARTERO.

Pour les États-Unis:
Signé:
(L. S.) A. BAILLY-BLANCHARD.

For the United States:
Signed
(L. S.) A. BAILLY-BLANCHARD.

Pour la France:
Signé:
(L. S.) R. BÉRENGER.

For France:
Signed
(L. S.) R. BÉRENGER.

Pour la Grande-Bretagne:
Signé:
(L. S.) E. W. FARNALL.
(L. S.) F. S. BULLOCK.
(L. S.) G. A. AITKEN.

For Great Britain:
Signed
(L. S.) E. W. FARNALL.
(L. S.) F. S. BULLOCK.
(L. S.) G. A. AITKEN.

Pour l'Italie:
Signé:
(L. S.) J. C. BUZZATTI.
(L. S.) GEROLAMO CALVI.

For Italy:
Signed
(L. S.) J. C. BUZZATTI.
(L. S.) GEROLAMO CALVI.

Pour les Pays-Bas:
Signé:
(L. S.) A. DE STUERS.
(L. S.) RETHAAN MACARE.

For the Netherlands:
Signed
(L. S.) A. DE STUERS.
(L. S.) RETHAAN MACARE.

Pour le Portugal:
Signé:
(L. S.) COMTE DE SOUZA ROZA.

For Portugal:
Signed
(L. S.) COUNT DE SOUZA ROZA.

Pour la Russie:
Signé:
(L. S.) ALEXIS DE BELLEGARDE.
(L. S.) WLADIMIR DÉRUGINSKY.

For Russia:
Signed
(L. S.) ALEXIS DE BELLEGARDE.
(L. S.) WLADIMIR DERUGINSKY.

Pour la Suisse:
Signé:
(L. S.) LARDY.

For Switzerland:
Signed
(L. S.) LARDY.

Pour copie certifiée conforme:
Le Ministre Plénipotentiaire, Chef du Service du Protocole,
ARMAND MOLLARD.

Ratifications deposited.

And whereas, the said Arrangement has been duly ratified by the Governments of the United States, Germany, Belgium, Spain, France, Great Britain, Italy, and Switzerland, and the ratifications of the said Governments were, as provided for by Article 6 of the said Arrangement, deposited by their respective Plenipotentiaries with the Government of the French Republic on March 15, 1911;

Ante, p. 1513.

Proclamation.

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Arrangement to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this thirteenth day of April in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States of America the one hundred and thirty-fifth.

[SEAL]

WM H TAFT

By the President:
P C KNOX
Secretary of State.